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## A Busted Flush: Regulation of Online Gambling in the European Union

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## NOTE

### A BUSTED FLUSH: REGULATION OF ONLINE GAMBLING IN THE EUROPEAN UNION

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### *INTRODUCTION*<sup>1</sup>

Online gambling is by its nature a cross-border activity. As gambling is generally considered a socially dangerous and somewhat disreputable form of entertainment, countries that are now Member States of the European Union have regulated gambling for centuries in order to protect various social interests and to generate tax revenues.<sup>2</sup> Over the years, various

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1. For the purpose of consistency, this Note adopts the Treaty of Lisbon numbering throughout, even when discussing cases decided under the Treaties of Rome or Amsterdam numbering. This Note also refers to the European Union and EU law when discussing cases decided before the European Union was formed, and refers to the Court of Justice of the European Union as the CJEU rather than the pre-Lisbon ECJ. The names of books or articles using pre-Lisbon terminology have not been changed.

2. *See, e.g.*, SPORTS BETTING: LAW AND POLICY 28–29 (Paul M. Anderson, Ian S. Blackshaw & Robert C.R. Siekmann eds., 2011) (discussing traditional conceptions of gambling as associated with fraud, crime, and moral disrepute); *see also* CRIME, ADDICTION AND THE REGULATION OF GAMBLING 1 (Cyrille Fijnaut, Alan Littler & Toine Spapens eds., 2008) (observing that national governments have regulated gambling for centuries based on dual arguments that it is best to channel the activity and that revenue ought to be directed towards the public interest); 8 AMBROSE BIERCE, THE COLLECTED WORKS OF AMBROSE BIERCE (1909-1912) (“The gambling known as business looks with austere disfavor upon the business known as gambling.”). Advocate General (“AG”) Dámaso Ruiz-Jarabo Colomer also explored gambling’s pervasive

European national governments have developed widely differing methods of regulating gambling.<sup>3</sup> The European Union, however, has sought to create a centralized system of gambling regulation that accommodates the free trade goals of the Treaty of Lisbon and the diverse policy objectives of the individual Member States.<sup>4</sup> One reasonably might argue that online gambling should be regulated at the EU level in order to assure the fundamental freedoms promised by the Internal Market. At the same time, while gambling is an economically significant industry, it implicates socially sensitive issues like the squandering of money, addiction to gambling, and organized crime.<sup>5</sup>

The conflict between the economic objectives of the borderless, supra-national trading zone and the national social objectives that the gambling industry affects is evident in the Court of Justice of the European Union's (the "CJEU") preliminary rulings regarding the compatibility of national

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presence in literature in his Opinion citing works by Cervantes, Dostoevsky, Chateaubriand, and Kant. Joined Cases 338, 359 & 360/04, Opinion of Advocate General Ruiz-Jarabo Colomer, *Massimiliano Placanica and Others* ("Placanica"), [2007] E.C.R. I-1894, ¶ 95 nn. 58–62. Each case before the CJEU is assigned an AG to research independently and deliver a non-binding opinion to the CJEU, and it is considered unusual for the CJEU to depart from the AG's opinion. ANTHONY ARNULL, *THE EUROPEAN UNION AND ITS COURT OF JUSTICE* 14–15 (2d. ed. 2006); see Consolidated Version of the Treaty on the Functioning of the European Union art. 252 (ex art. 222 TEC), 2012 O.J. C 326/47, at 207 [hereinafter TFEU]; *id.* art. 253 (ex art. 223 TEC), at 208; TREVOR HARTLEY, *THE FOUNDATIONS OF EUROPEAN UNION LAW* 49–50 (7th ed. 2010) (describing AGs as independent representatives of the public like the French *commissaire du gouvernement*).

3. See Commission of the European Communities, *On On-line Gambling in the Internal Market: Green Paper from the Commission to the European Council*, COM (2011) 128 final, at 3 (Mar. 24, 2011) [hereinafter Green Paper] (establishing there are generally two regulatory models applied in the EU Member States: one based on a controlled monopoly (often public) and the other based on licensed gambling providers operating within a controlled regulatory scheme).

4. Consolidated Version of the Treaty on European Union, 2012 O.J. C 326/13 [hereinafter TEU post-Lisbon].

5. See Steve Scherer, *INSIGHT—Italian Gaming Liberalisation: A Bet That Did Not Pay Off*, REUTERS (July 17, 2012, 6:01 PM), <http://www.reuters.com/article/2012/07/17/us-italy-gaming-idUSBRE86G0JJ20120717> (highlighting that 700,000 Italians are addicted to gambling and the mafia uses legal gambling to launder billions of euros); see also Tom Kingston, *State and Mafia Take Their Cut As Italians Develop Gambling Habit*, GUARDIAN, Feb. 29, 2012, <http://www.theguardian.com/world/2012/feb/29/state-mafia-italy-gambling> (describing how the economic crisis has driven many Italians to gamble).

gambling regulation with the objectives of the Internal Market.<sup>6</sup> A logical question, then, is whether the deferential treatment granted to Member States in gambling regulation violates the fundamental freedoms of the Internal Market and the Treaty of Lisbon. The Treaty of Lisbon allows restrictions on the freedom to provide services, provided the regulations do not discriminate on the basis of nationality and are tailored to public policy, public security, or public health objectives.<sup>7</sup> The CJEU has recognized regulation of gambling to be a restriction on the provision of services but generally allows such regulation in deference to the Member States' social policy objectives.<sup>8</sup> Due to political and social sensitivity, adoption of legislation by the tricameral EU system, to date, has not been feasible.<sup>9</sup> Thus, the assessment of the compatibility of national gambling regulations with EU law has been left to the CJEU.

Greater cooperation at the EU level would help Member States more effectively achieve the objectives of consumer protection and fraud prevention in regulation of online gambling. Until EU-wide regulation becomes a feasible political option, if it ever does, this Note argues that the CJEU should undertake a specific and stringent judicial review in examining

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6. See Hartley, *supra* note 2, at 47 (listing the number of judicial bodies that compose the Court of Justice of the European Union: the Court of Justice, the General Court, and the specialized courts); see also ARNULL *supra* note 2, at 5 (describing the establishment of the CJEU in 1951 in the Treaty establishing the European Coal and Steel Community and noting that under Article 31 the CJEU must ensure "that in the interpretation and application of this Treaty, and of rules laid down for the implementation thereof, the law is observed").

7. See TFEU, *supra* note 2, art. 61 (ex art. 54 TEC), 2012 O.J. C 326, at 77 (allowing restrictions provided they do not discriminate on the basis of nationality); see also *id.* art. 52 (ex art. 46 TEC), at 90 (allowing restrictions on the basis of public policy, public security, and public health).

8. See, e.g., *Her Majesty's Customs and Excise v. Gerhart Schindler and Jörg Schindler* ("Schindler"), Case C-275/92, [1994] E.C.R. I-1078, ¶ 45 (holding that the UK legislation is "an obstacle to the freedom to provide services").

9. See CATHERINE BARNARD, *THE SUBSTANTIVE LAW OF THE EUROPEAN UNION: THE FOUR FREEDOMS* 390 (2013) (recognizing regulation in the gambling sector to be a "sensitive socio-cultural issue" where Member States are granted a wide margin of discretion); see also *supra* notes 61–73 and accompanying text (regarding the difficulties in implementing legislation in the gambling market sector); Alain-Laurent Verbeke, *Gambling Regulation in Europe: Moving Beyond Ambiguity and Hypocrisy*, in *IN THE SHADOW OF LUXEMBOURG* 258 (Alan Littler et al. eds., 2011) (concluding that political sensitivity "obviously is the reason" why gambling regulation has not been implemented at the EU-level).

the compatibility of national regulations of online gambling with the Treaty of Lisbon. By thoroughly examining each national legislature's objectives and the discriminatory effects of the restrictions they adopt, the CJEU can help ensure that national restrictions on the gambling sector systematically pursue legitimate national policy objectives which are consistent with the objectives of the European Union.

In Part I, this Note briefly summarizes the state of the European gambling market in the context of the Internal Market, the lack of EU-wide regulation, and the messy compatibility law the CJEU has been left to create on its own. Then, in Part II, this Note compares the two conflicting frameworks the CJEU has developed over the past two decades for analyzing the compatibility of a Member State's territory-based and online gambling regulation with the fundamental freedoms of the Treaty of Lisbon. In Part III, this Note argues that the CJEU should return to the more stringent compatibility analysis laid down in two of its leading precedents, *Criminal proceedings against Piergiorgio Gambelli* and *Placanica and Others*, because this more demanding analysis of consistency and proportionality in gambling regulation strikes an appropriate balance between the ideals of the Treaty of Lisbon and the interests of national sovereignty.<sup>10</sup>

#### I. THE EUROPEAN GAMBLING SECTOR AND THE INTERNAL MARKET

Part I provides the background for exploring current gambling regulation in the European Union and the conflicts the European Union faces. First, Part I.A briefly outlines the gambling market in the European Union today. Second, Part I.B discusses the fundamental freedoms enshrined in the Treaties of the European Union and identifies the social policy objectives that justify national restrictions on the gambling market. Part I.C explains the principle of mutual recognition and how it is employed as a gap-filler where there is no EU-wide harmonization in an economic sector. Part I.D outlines

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10. See *Criminal Proceedings against Piergiorgio Gambelli* (*Gambelli*), Case C-243/01, [2003] E.C.R. I-13031; see also *Placanica and Others* (*Placanica*), Joined Cases 338, 359 & 360/04, [2007] E.C.R. I-1891.

measures the EU legislative institutions have taken and goals they have set relating to online gambling regulation. Finally, Part I.E discusses the preliminary rulings laid down by the CJEU analyzing gambling regulation over the past two decades.

#### *A. The European Gambling Market and National Regulation*

Online gambling, by its nature, is just as accessible across national frontiers as within them; this has made it difficult for Member States to apply preexisting national territory-based gambling regulation to online gambling.<sup>11</sup> As the Commission's Green Paper on On-Line Gambling (the "Green Paper") observed, most gambling regulations were devised in the context of territory-based gambling regulations and are not effective in regulating the Internet.<sup>12</sup> The licensed gambling industry in the European Union generated an estimated EU€84.9 billion in revenues in 2011, and licensed casinos employ an estimated 55,000 workers.<sup>13</sup> With the advent of online gambling sites, such

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11. Green Paper, *supra* note 3, at 3 (concluding that rapid growth of online gambling has made it difficult for differing regulatory regimes in Member States to co-exist).

12. Green Paper, *supra* note 3, at 3 (noting that the two regulatory frameworks co-existed before online gambling because of the limited possibility of providing cross-border gambling services, and the current "challenges posed by the co-existence of differing regulatory models is illustrated by the number of preliminary rulings in this area"); see also Anthony Dawes & Kai Struckmann, *Rien ne va plus? Mutual Recognition and the Free Movement of Services in the Gambling Sector after the Santa Casa Judgment*, 35 EUR. L. REV. 236, 261 (2010) (highlighting a number of preliminary rulings underway and the legal uncertainty surrounding online gambling regulation and further declaring there are "few fields where the application of the fundamental freedoms is as disputed as online gambling").

13. See *Gambling*, EUROPEAN COMMISSION, (Jan. 30, 2014), [http://ec.europa.eu/internal\\_market/gambling/index\\_en.htm](http://ec.europa.eu/internal_market/gambling/index_en.htm) (estimating the overall gambling market produces revenues of approximately EU€84.9 billion in 2011 and grows at three percent per year); see also *Revenues and Employees 2012*, EUR. CASINO ASSOC., (2012), [http://www.europecasinoassociation.org/fileadmin/user\\_upload/Facts\\_and\\_figures/Europe\\_ECA\\_revenues\\_2012\\_final\\_public\\_data.pdf](http://www.europecasinoassociation.org/fileadmin/user_upload/Facts_and_figures/Europe_ECA_revenues_2012_final_public_data.pdf) (estimating the total number of European licensed casino employees in 2012 to be 55,916—this figure excludes other sectors of gambling and unlicensed operations). In a study commissioned by the European Commission, the Swiss Institute of Comparative Law found that the EU gambling market generated Gross Gaming Revenues ("GGR"), which represents gross winnings after payment of prizes, of approximately EU€51.5 billion in 2003. This is roughly equivalent to the US gaming industry's generated GGR of EU€60.7 billion (approximately US\$72.8 billion) in 2003. EUROPEAN COMMISSION, *STUDY OF GAMBLING SERVICES IN THE INTERNAL MARKET OF THE EUROPEAN UNION* 1102 (June 14, 2006); see also Opinion of Advocate General Bot, *Liga Portuguesa de Futebol Profissional* and

as Bwin, Stanleybet, and Happybet, the online gambling industry is the most rapidly growing segment of the market, with a growth rate of almost fifteen percent annually and projected annual revenues to be EU€13 billion in 2015.<sup>14</sup>

Online gambling presents new and serious social risks. An estimated 6.8 million European gamblers enjoy games of chance without leaving their homes, and online financial transactions can easily be carried out electronically.<sup>15</sup> Online, the player is isolated and anonymous; it is difficult for operators to verify the gambler's identity, and minors can circumvent prohibitive procedures.<sup>16</sup> An unscrupulous operator can open up a website and shut it down within minutes of defrauding consumers.<sup>17</sup>

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Bwin International Ltd. v. Departamento de Jogos da Santa Casa da Misericórdia de Lisboa (*Santa Casa*), Case C-42/07, [2009] E.C.R. I-7633, ¶ 27 (stating that the gaming industry is considerable, generates a large income, and provides a substantial number of jobs). In a later study in 2008, the EU gambling market was estimated to generate GGR in excess of EU€75.9 billion that year. *See* Green Paper, *supra* note 3, at 8.

14. *See Gambling*, *supra* note 13 (considering online gambling to be the fastest growing sector at about 15% per year with revenues expected around EU€13 billion in 2015); *see also* Green Paper, *supra* note 3, at 13 (defining “online gaming” as provision via the internet of sports betting services, casino games, media games, gambling services operated by and for the benefit of recognized charities and non-profit organizations, spread betting, promotional games, and lottery services).

15. *See Gambling*, *supra* note 13 (estimating 6.8 million consumers participate in the online gambling market); *see also* Opinion of Advocate General Bot, *Santa Casa*, [2009] E.C.R. I-7633, ¶ 43 (concluding that gambling via the Internet is becoming increasingly available to more consumers, progressively easier to use each year, and that financial transactions can easily be carried out through electronic means); SALLY GAINSBURY, INTERNET GAMBLING: CURRENT RESEARCH FINDINGS AND IMPLICATIONS 3–4 (2012) (highlighting that fast and cheap broadband access provides easier, 24/7 access from any location to a variety of online gambling activities).

16. *See* Opinion of Advocate General Bot, *Santa Casa*, [2009] E.C.R. I-7633, ¶ 270 (emphasizing that “Internet relationships are anonymous” and security measures can be easily circumvented online); *see also* Gainsbury *supra* note 15, at 4 (distinguishing the continuous and solitary quality of online gambling from traditional gambling).

17. The United States recently argued to the World Trade Organization (“WTO”) that online gaming facilitates money laundering. Appellate Body Report—*United States—Measures Affecting the Cross-border Supply of Gambling and Betting Services*, WT/DS285/AB/R (Apr. 7, 2005). In view of the risks that online gambling poses to the consumer and the public order, the Appellate Body of the WTO found that regulations imposed by the United States on online gaming “were necessary for the protection of public morality and the maintenance of public order.” Opinion of Advocate General Bot, *Santa Casa*, [2009] E.C.R. I-7633, ¶ 274, n.113 (quoting *A.B. Report—United States—Gambling and Betting Services*, ¶ 327, WT/DS285/AB/R (Apr. 7, 2005)); *see also* Gainsbury, *supra* note 15, at 77–78 (discussing examples of gambling sites defrauding consumers, such as Absolute Poker and Ultimate Bet employees that bilked consumers



Online gambling presents heightened risks of addiction with twenty-four hour access to a multitude of games and lines of credit at the touch of a button.<sup>18</sup> The casino never closes on your laptop.

On the one hand, online gambling creates high risks to consumers and society at large; on the other hand, Member States often obtain a significant source of revenue from taxes on gambling activity.<sup>19</sup> Gambling addiction can lead to debt and despair, which in one instance induced an Italian policeman to kidnap his neighbor's son for ransom and, in another, led a young man to self-immolate.<sup>20</sup> Moreover, organized crime groups use legal gambling operations to launder billions of euros with little chance of detection.<sup>21</sup> The European Union, to date, has not taken significant steps to regulate online gambling at the EU level due to these politically sensitive social risks associated with the activity and the revenue opportunities for Member States.<sup>22</sup>

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out of over US\$23 million through accessing private accounts and citing identity theft, bankruptcy, and scam emails as potential risks associated with online gambling).

18. See, e.g., François Trucy, *The Role of Crime and Addiction in the Gambling Policy of France*, in *CRIME, ADDICTION AND THE REGULATION OF GAMBLING*, *supra* note 2, at 139 (commenting that the French system of regulation is ill-equipped to face new issues posed by online gambling and recognizing the gravity of gambling addiction); see also SÉNAT, *LA LUTTE CONTRE LA DÉPENDANCE AUX JEUX* (Sept. 2007), [http://www.senat.fr/lc/lc175/lc175\\_mono.html#toc0](http://www.senat.fr/lc/lc175/lc175_mono.html#toc0) (surveying legal measures Germany, Belgium, Denmark, Great Britain, Italy, and the Netherlands have taken to fight gambling addiction); GAINSBURY, *supra* note 15, at 3 (reporting that there are an estimated 199 payment methods available for online gambling, which make payment or withdrawal of money through multiple channels or through channels that circumvent regulation possible).

19. See *CRIME, ADDICTION AND THE REGULATION OF GAMBLING*, *supra* note 2, at 1 (acknowledging gambling is regulated in order to both channel the activity and to direct profits towards the general interest); see also Caroline Jawad & Stephen Griffiths, *Preventing Problem Gambling on the Internet Through the Use of Social Responsibility Mechanisms*, in *CRIME, ADDICTION AND THE REGULATION OF GAMBLING*, *supra* note 2, at 204 (stating that policy makers must balance potential material benefits of gambling with the need to curb the activity).

20. See Tom Kingston, *State and Mafia Take Their Cut As Italians Develop Gambling Habit*, *GUARDIAN*, Feb. 29, 2012, <http://www.theguardian.com/world/2012/feb/29/state-mafia-italy-gambling> (recounting how a policeman kidnapped his neighbor's son for EU€85,000 because he had "lost everything at video poker" and the story of how a young Italian man self-immolated due to gambling debt).

21. See Scherer, *supra* note 5 (claiming that the mafia clans in Italy are the biggest winners in gambling because they use the legal operations to launder billions of euros).

22. See BARNARD, *supra* note 9, at 390 (finding gambling regulation to be a "sensitive socio-cultural issue" where Member States are granted a significant amount

The European Union has enacted rules regulating electronic commerce, but these do not fully apply to online gambling, and Member States retain the principal regulatory role in this sector.<sup>23</sup> The lack of a coherent EU-wide policy on online gambling and the lack of enforcement of the variety of existing national rules across the Member States have created legal uncertainty that operators exploit.<sup>24</sup> Out of 14,823 active Internet gambling sites operating in the European Union in 2006, the Green Paper indicated that more than eighty-five percent of such sites operated without a license in an undefined or illegal market.<sup>25</sup> Moreover, the problems Member States have faced in enforcing regulation in the online gambling sector are readily apparent in the unusually large number of preliminary rulings the CJEU has been asked to make in this area.<sup>26</sup>

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of discretion); *see also* GAINSBURY, *supra* note 15, at 50–52 (citing one of the biggest challenges in Europe to be heterogeneous regulation in each Member State, and that this inconsistency causes problems for regulators, operators, and consumers alike). Gambling services are neither regulated by any sector-specific regulation at the EU level, nor included in the Services Directive (2006/123/EC) or the E-commerce Directive (2000/31/EC). They are, however, subject to the Audiovisual Media Services Directive (2010 O.J. L 95/1), the Unfair Commercial Practices Directive (2005 O.J. L 149/22), the Distance Selling Directive (1997 O.J. L 144/p. 19), the Anti-Money Laundering Directive (2005 O.J. L 309/15), the Data Protection Directive (1995 O.J. L 281/31), the Directive on privacy and electronic communication (2002 O.J. L 201/37), and the Directive on the common system of value added tax (2006 O.J. L 347/1). Green Paper, *supra* note 3, at 7, 12 (clarifying that gambling services are not regulated at the EU level and are specifically excluded from certain legislation like the E-commerce Directive and then listing legislation gambling is subject to).

23. *See infra* notes 63–73 and accompanying text (discussing regulations governing electronic commerce in the European Union and the Member States' role in regulating online gambling).

24. *See* Dawes & Struckmann, *supra* note 12, at 261 (“In these evolving legal circumstances, economic operators and their consumers (as well as regulators themselves) face considerable legal uncertainty . . .”); *see also* GAINSBURY, *supra* note 15, at 4 (observing that the regulatory position of online gambling is not clear, which creates legal uncertainty for consumers and operators alike).

25. Green Paper, *supra* note 3, at 3 (“[O]ut of 14,823 active gambling sites in Europe more than 85% operated without any licence.” (citing Laboratoire d’Expertise Securite Informatique, *Cyber-Criminality in Online Gambling: White Paper by CERT-LEXSI*, July 2006, available at [http://www.lexsi.com/telecharger/gambling\\_cybercrime\\_2006.pdf](http://www.lexsi.com/telecharger/gambling_cybercrime_2006.pdf))).

26. *See* STUDY OF GAMBLING SERVICES IN THE INTERNAL MARKET OF THE EUROPEAN UNION, *supra* note 13, at 4-964 (cataloging 587 cases brought before national Courts, mostly in Germany, regarding restrictions on cross-border gambling services as of the year 2006).

*B. The Gambling Regulation Exception to the Fundamental Freedoms of the European Union*

Currently, as noted above, the European Parliament and the Council have not adopted any measures directed at governing online gambling, and there is no EU-wide harmonization in the gambling sector. The Member States have, over the centuries, developed their own schemes of gambling regulations that reflect wide variations both in application and social objectives.<sup>27</sup> Broadly, two major systems have developed across the European Union to regulate gaming. A number of states have employed a state monopoly or partial monopoly on gambling with success, while others have adopted a licensing system often coupled with a quota limit on the number of licenses the Member State will grant.<sup>28</sup> Both systems, however, have been found to restrict the freedom of services.<sup>29</sup> The European Union, the CJEU, and the Member States have faced major challenges in making these disparate regulations compatible with the fundamental freedoms enshrined in the Treaty of Lisbon.<sup>30</sup>

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27. See CRIME, ADDICTION AND THE REGULATION OF GAMBLING, *supra* note 2, at 1 (explaining that governments have regulated gambling for centuries); see also Green Paper, *supra* note 3, at 3 (outlining differing regulatory models applied in Member States); STUDY OF GAMBLING SERVICES IN THE INTERNAL MARKET OF THE EUROPEAN UNION, *supra* note 14, at xiv–xvi (finding that, generally, if a Member State regulates gambling, it either applies a controlled monopoly scheme with the gaming operator being owned or controlled by the Member State or a strictly regulated licensing system).

28. See, e.g., *Ladbrokes Betting & Gaming Ltd. v. Stichting de Nationale Sporttolisator (Ladbrokes)*, Case C-258/08, [2010] 3 C.M.L.R. 40, ¶ 16 (discussing the grant of exclusive monopoly rights to an operator); Massimiliano Placanica, Christian Palazzese, Angelo Sorrichio (*Placanica*), Joined Cases C-338/04, C-359/04, and C-360/04, [2007] E.C.R. I-1891, ¶¶ 3–10 (outlining the licensing scheme employed in Italy whereby the government grants a limited number of licenses to operators).

29. See, e.g., *Gambelli*, [2003] E.C.R. I-13031, ¶ 106 (finding the licensing system in Italy to be an obstacle to the free provision of services); *Liga Portuguesa de Futebol Profissional and Bwin International Ltd. v. Departamento de Jogos da Santa Casa da Misericórdia de Lisboa (Santa Casa)*, Case C-42/07, [2009] E.C.R. I-7633, ¶¶ 52–54 (concluding that the Portuguese public monopoly system is a restriction on the freedom to provide services).

30. See Opinion of Advocate General Mengozzi, *Carmen Media Group Ltd. v. Land Schleswig-Holstein, Innenminister des Landes Schleswig-Holstein*, March 3, 2010, ¶ 1 (asserting that the CJEU's major challenge in a non-harmonized sector like gambling regulation is to "find common ground allowing the observance of the freedoms enshrined in the Treaty").

At their core, the Articles that create the Internal Market are intended to open up markets in order to increase competition and progress, which benefits customers and the economy as a whole.<sup>31</sup> Free trade allows for specialization and greater competition, which, through economies of scale, ideally lead to greater productivity.<sup>32</sup> Furthermore, the Treaty of Lisbon is designed to prevent national markets from becoming “fiefdoms of the providers established there.”<sup>33</sup> Markets must be kept open for the benefit of all and cannot be allowed to “crystallise” or calcify.<sup>34</sup> By preventing this calcification, increased trade and mutual dependency promote peace in Europe.<sup>35</sup>

The CJEU has issued a number of preliminary rulings on the compatibility of Member States’ restrictions on gambling with the Treaty of Lisbon.<sup>36</sup> In many of these rulings, the CJEU

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31. See TFEU, *supra* note 2, art. 26 (ex art. 14 TEC), 2012 O.J. C 326, at 59 (defining the internal market as comprising “an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties”); see also ALAN DASHWOOD ET AL., WYATT AND DASHWOOD’S EUROPEAN UNION LAW 391 (6th ed. 2011) (“One of the main aims of the European integration project is that of market integration.”); Stefan Enchelmaier, *Always At Your Service (Within Limits): The ECJ’s Case Law on Article 56 TFEU (2006–11)*, 36 EUR. L. REV. 615, 639 (2012) (“Above all . . . Member States must not discriminate against goods or services from other Member States.”).

32. BARNARD, *supra* note 9, at 3–4 (arguing that free trade leads to specialization and comparative advantage, this then allows for economies of scale and maximum productivity for all (citing ADAM SMITH, THE WEALTH OF NATIONS (1776))).

33. Enchelmaier, *supra* note 31, at 639 (welcoming the CJEU’s rejection of Member States’ economic protectionism because “national markets are not the fiefdoms of the providers established there”).

34. *Id.* at 618 (citing language from *Commission v. United Kingdom (beer and wine)*, Case C-170/78, [1983] E.C.R. I-2265, on the prohibition of protectionist taxation forbidden by TFEU art. 110 (ex art. 90 EC/95 EEC)).

35. BARNARD, *supra* note 9, at 6, 28 (“The driving force behind the European Union is, and has always been, the consolidation of a post-war system of inter-state cooperation and integration that would make pan-European armed conflict inconceivable” and further arguing that increasing prosperity in two interdependent trading countries and trade also facilitate peace because “countries trading peacefully are less likely to go to war”).

36. See TFEU, *supra* note 2, art. 267 (ex art. 234 TEC), 2012 O.J. C 326, at 164 (granting the CJEU the power to issue preliminary rulings regarding the interpretation of the Treaties and the validity of EU acts in reply to questions raised by national courts or tribunals); see also *The Proceedings of the Court of Justice and Court of First Instance of the European Communities*, No. 15/95, ¶ 11 (May 22–26, 1995) (stating that the preliminary ruling system is the “veritable cornerstone of the . . . internal market, since it . . . ensur[es] that the law established by the Treaties retain its Community character with a

has found restrictions on the free market to be justified in light of certain policy objectives beyond the Treaty-based exceptions.<sup>37</sup> Attempts to regulate online gambling potentially restrict two crucial fundamental freedoms: the freedom of establishment and the freedom to provide services.<sup>38</sup> The fundamental freedoms provide equal rights of access to the market to all, but they do not preclude appropriate regulation of the gambling market within each Member States' borders.<sup>39</sup> The Treaty allows regulation that discriminates on the basis of nationality when it is tailored to achieve a "public policy, public security or public health" objective.<sup>40</sup>

Furthermore, the CJEU has created exceptions to the freedoms in the name of overriding public interest, which national legislatures often cite in justifying gambling

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view to guaranteeing that the law has the same effect in all circumstances in all the Member States of the European Union"); ARNULL, *supra* note 2, at 97 ("It is hard to exaggerate the importance of the preliminary rulings procedure."). The rulings are interlocutory and the referring national court is bound by the CJEU's judgment. *See id.* at 95 ("The ruling given by the Court is an interlocutory one: it constitutes a step in the proceedings before the national court which, although bound by it, must proceed to apply it to the facts of the case. It is in this sense that the ruling of the Court of Justice is preliminary."); *see also* DASHWOOD, *supra* note 31, at 228 (stating that the referring court must give full effect to the CJEU's ruling even if it conflicts with provisions of national law).

37. *See* TFEU, *supra* note 2, art. 52 (ex art. 46 TEC), 2012 O.J. C 326, at 69 (allowing regulation that may restrict the freedom of establishment or free provision of services "on grounds of public policy, public security or public health"); *see also* BARNARD, *supra* note 9, at 497 (stating that the public interest requirements supplement the express derogations of article 52).

38. TFEU, *supra* note 2, arts. 18, 49, 56 (ex arts. 12, 43, 49 TEC), 2012 O.J. C 326, at 56, 67, 70 (prohibiting restrictions on the freedom of primary and secondary establishment, prohibiting restrictions on the freedom to provide services, and enshrining the principle of non-discrimination on the grounds of nationality further); DASHWOOD, *supra* note 31, at 31 (observing that the principle of non-discrimination on the basis of nationality has played a central role in the development of EU law in many fields beyond services).

39. Enchelmaier, *supra* note 31, at 639–40 (asserting that the Internal Market means equal rights of access for all but allows the possibility of regulation by each Member State).

40. *See* TFEU, *supra* note 3, art. 52 (ex art. 46 TEC), 2012 O.J. C 326, at 69; *see also* BARNARD, *supra* note 9, at 17 (declaring the principle of non-discrimination to be the cornerstone of the four freedoms); *see also* Jochen Meulman & Henri de Waele, *A Retreat from Säger? Servicing or Fine-Tuning the Application of Article 49*, 33 *LEGAL ISSUES ECON. INTEGRATION* 207, 210 (2006) (outlining the theoretical underpinnings of the free provision of services and concluding that striving for non-discrimination and market access will better help to integrate national markets).

regulations. In the 1974 leading precedent, *J.H.M. van Binsbergen v. Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid*, the CJEU held that Member States could restrict and regulate cross-border services to protect the “general good” or public interest.<sup>41</sup> *Van Binsbergen* determined that certain overriding policy objectives, like maintaining standards of conduct in the legal profession, could justify a restriction on provision of services. Later rulings have reaffirmed this holding and given the compatibility analysis more teeth in protecting market access.<sup>42</sup> Thus, overriding policy objectives may justify a gambling regulation if grounded in moral, religious, or cultural factors, or if the legislature shows that gambling has harmful consequences.<sup>43</sup>

The two major types of policy justifications that the CJEU has found sufficient to allow restriction in the gambling sector are consumer protection and crime prevention.<sup>44</sup> The CJEU,

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41. *J.H.M. van Binsbergen v. Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid (Van Binsbergen)*, Case C-33/74, [1974] E.C.R. 1299, ¶ 12 (“[S]pecific requirements imposed on the person providing the service cannot be considered incompatible with the Treaty where they have as their purpose the application of profession rules justified by the general good . . . .”); *see also* *Stichting Collectieve Antennevoorziening Gouda v. Commissariaat voor de Media (Gouda)*, Case 2-88/89, [1991] E.C.R. I-4007, ¶ 10 (“Article [56 TFEU] entails, in the first place, the abolition of any discrimination against a person providing services on the grounds of his nationality or the fact that he is established in a Member State other than the one in which the service is provided.”). In *Van Binsbergen*, a Dutch national who lived in Belgium challenged a rule that required lawyers to be established in the Netherlands before they could represent a client in Dutch courts. *Van Binsbergen*, [1974] E.C.R. 1299, at 1301–02.

42. *See Gebhard v. Consiglio dell’Ordine degli Avvocati e Procuratori di Milano (Gebhard)*, Case C-55/94, [1995] E.C.R. I-4165, ¶ 37 (“[N]ational measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfill four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it.”); *see also* BARNARD, *supra* note 9, at 19 (arguing that the CJEU since *Gebhard* favors the market access approach, which finds unlawful Member State regulation that prevents or hinders access to the market, regardless of whether the regulation discriminates on the basis of nationality).

43. *Gambelli*, [2003] E.C.R. I-13031, ¶ 63 (finding that moral, religious, and cultural factors can justify granting a margin of discretion to national authorities in regulation of gambling activities and determining “what consumer protection and the preservation of public order require”).

44. *See* Dawes & Struckmann, *supra* note 12, at 239 (dividing the acceptable policy justifications into two main categories: “social” objectives such as consumer protection

however, is seen by some scholars to give greater deference to the national legislatures when they are regulating against crime.<sup>45</sup> Social objectives are increasingly used to justify national gambling regulations, but the CJEU has consistently rejected Member State objectives of economic protectionism, the stabilization of tax revenue, and administrative convenience.<sup>46</sup>

Moreover, the CJEU insists in its rulings on the consistency and proportionality of the means to the targeted policy objectives. Indeed, the CJEU stated in *Gambelli* that where a Member State pursues a policy of expanding gambling operations and aggressively advertising for its own state-run gambling enterprise, the policy and advertisements could be found inconsistent with the legislative objective of protecting

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and crime reduction objectives). *But see* Verbeke, *supra* note 9, at 257 (questioning why consumer protection against addiction is regulated at the national level—“[a]re the risks for a Belgian player so different from those for someone in Germany, France, or Greece?”).

45. *See* Dawes & Struckmann, *supra* note 12, at 240, 244 (stating that there is little evidence given of fraud online or studies produced on this issue, and that the CJEU has granted too much deference and discretion to the national legislatures here, and also arguing that the CJEU has adopted a more stringent approach in relation to social objectives in contrast to objectives aimed at reducing criminal activity); Verbeke, *supra* note 9, at 258 (declaring that “criminality is an international business” and arguing that it should be attacked at the EU-level). *But see* Joined Opinion of Advocate General Bot for Sporting Exchange Ltd. (t/a Betfair) v. Minister van Justitie and Ladbrokes Ltd. v. Stichting de Nationale Sporttolisator, ¶ 92 (“I do not think that the defence of the fundamental freedoms of movement justifies expecting the Member States to wait until actual networks of clandestine gaming develop . . . . A Member State has the right to invoke the risk of fraud associated with gaming as the basis for legislation restricting that activity, without being required to show that fraud is actually being committed in its territory.”); Dawes & Struckmann, *supra* note 12, at 240 (“A national measure aimed at reducing criminal activity relating to gambling may therefore be necessary and proportionate, even where its net result is to incite and encourage consumers to participate in games of chance.”).

46. *See* Enchelmaier, *supra* note 31, at 639 (discussing examples of the CJEU rejecting these types of objectives in the gambling regulation case law: The Italian government’s proposed economic protectionism objective in limiting horse-race betting failed in *Commission v. Italy* and the French government’s pursuit of stable tax revenue used to invest in rural projects failed to justify regulations in *Zeturf*); *see also* *Opinion of Advocate General Ruiz-Jarabo Colomer, Placanica*, ¶ 108 (stating that the CJEU has rejected the diminution or tax revenue or loss of financing as an overriding policy justification in past judgments such as *Gambelli*); *Zeturf Ltd. v. Premier Ministre (Zeturf)*, Case C-212/08, [2011] 3 C.M.L.R. 30, ¶ 48 (“[A]dministrative inconvenience does not constitute a ground that can justify a restriction on a fundamental freedom guaranteed by [EU] law.”).

consumers from the vice of gambling.<sup>47</sup> In order to control and prevent fraud in gambling activities, however, the Member State needs its regulated gambling system to be the preferred system for prospective gamblers; this requires advertising, a range of games of chance, and top-of-the-line facilities.<sup>48</sup> As the CJEU pointed out in *Gambelli*, however, the goal of consumer protection is ultimately undermined by the marketing and expansion of state-owned or controlled gambling systems that induces consumers to use the gambling product.<sup>49</sup> Consumers are not protected against the risks of gambling where the Member State is hypocritically encouraging the consumers to gamble.

*C. Lack of Harmonization and the Principle of Mutual Recognition of Regulation*

There is currently no harmonization in the field of gambling regulation though the EU legislature has the power to adopt directives to harmonize differing rules in each Member State into one uniform EU-wide rule that advances the internal

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47. See *Gambelli*, [2003] E.C.R. I-13031, ¶¶ 68–69 (stating that the Italian authorities were pursuing an expansionist policy in gambling and could not justify such legislation in the name of consumer protection and reducing gambling opportunities in Italy); see also *Opinion of Advocate General Alber, Gambelli*, [2003] E.C.R. I-13031, ¶ 127 (declaring “it is clear from the submissions of the Member States that what they fear most is the economic consequences of changes within the gambling sector. Little reference is made in this context to any dangerous effects that gambling might have on gamblers and their social environment. Consequently, such fears likewise cannot be regarded as an interest in the protection of consumers that would constitute an overriding reason in the general interest.”). But see *Ladbroke’s*, [2010] 3 C.M.L.R. 40, ¶ 38 (holding that it is for the national court “to determine whether unlawful gaming activities constitute a problem which might be solved by the expansion of authorised and regulated activities, and whether that expansion is on such a scale as to make it impossible to reconcile with the objective of curbing such addiction”).

48. See *Ladbroke’s*, [2010] 3 C.M.L.R. 40, ¶ 25 (concluding that in order to channel gambling activity, Member States need to be a “reliable” and “attractive” alternative to clandestine gambling operations); see also *infra* notes 165–73 and accompanying text (summarizing the CJEU’s opinion in *Ladbroke’s* and *Betfair*).

49. See *Opinion of Advocate General Alber, Gambelli*, [2003] E.C.R. I-13031, ¶¶ 121, 127–29 (observing that the Italian authorities pursue “aggressive” advertising “intended to instill and foster a desire to gamble” and it is clear that Italy most fears a loss of revenue, and that these economic objectives cannot justify a restriction on the free provision of services).



market.<sup>50</sup> Harmonization of disparate Member State regulations can vary in degree; a common form called minimum harmonization sets the floor for national regulation, while comprehensive harmonization leaves little room for national differences.<sup>51</sup> Since the landmark judgment of *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein* (“*Cassis de Dijon*”), the Commission and the CJEU have applied the principle of mutual recognition in the free movement of goods as a gap-filler in the absence of harmonization.<sup>52</sup>

Mutual recognition is considered to be a “corner stone” of the Internal Market because it enables products to move freely despite differing national regulations.<sup>53</sup> When applied in a market sector, mutual recognition provides that goods in conformity with one Member State’s regulations are also in conformity with another Member State’s regulations, despite discrepancies, and, thus, creates a presumption in favor of

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50. See BARNARD, *supra* note 9, at 656 (summarizing harmonization as the replacing of many divergent Member State regulations in a specific field with a single EU-wide regulation).

51. *Id.* at 662 (establishing that minimum harmonization sets standards for the Member States, but the Member States are still free to legislate further, an especially attractive option in areas of regulation that implicate social and moral policy). States are free to experiment above the minimum standard, but they usually have to inform the Commission about the acts they have implemented. This creates a useful database for the Commission about successful policy initiatives that can then be implemented EU-wide. *Id.* at 662, 665–66. One example of success in using the Member States as policy labs is in the environmental field: Austria, Finland, and Sweden successfully applied stricter environmental standards than required by the directive, which led to the adoption of higher EU-wide standards in a number of areas. *Id.* at 666 n. 258 (discussing COM (98) 745).

52. *Cassis de Dijon*, Case 120/78, [1979] E.C.R. 649 (decided on free movement of goods grounds). This case involved the banning of importation into Germany of fruit liqueurs due to insufficient alcohol content. The CJEU found that absent harmonization, there is no reason why lawfully produced and marketed goods cannot be sold in another Member State. *Id.* ¶ 13. Shortly after this ruling, the Commission issued an interpretative communication, which recognizes the principle of equivalence or mutual recognition. BARNARD, *supra* note 9, at 95; see European Commission, Communication from the Commission Regarding the *Cassis de Dijon* Judgment, 1980 OJ C256/2. In 2007, the Commission revitalized this principle of mutual recognition through regulation. European Commission, Package on the Internal Market for Goods, COM (2007) 35.

53. See Commission, Communication on Internal Market Strategy, Priorities 2003–2006, COM (2003) 238 final, at 7 (May 2003) (basing the presumption that products in conformity with the national laws of the Member State allow the product marketed to move freely in that Member State on the *Cassis* judgment, and declaring “[m]utual recognition is the corner stone of the Internal Market”).

market access.<sup>54</sup> The principle of mutual recognition is also applied with regard to services and establishment.<sup>55</sup>

In 2009 in *Liga Portuguesa de Futebol Profissional and Bwin International Ltd v. Departamento de Jogos da Santa Casa da Misericórdia de Lisboa*, the CJEU rejected the application of mutual recognition in the gambling sector.<sup>56</sup> The CJEU followed the Opinion of AG Yves Bot who found that encouraging competition in gambling is not “a source of progress and development” in the same way as, for example, the freedom of movement of patients within the European Union increased the range of medical treatment available.<sup>57</sup> AGs Dámaso Ruiz-Jarabo Colomer and Siegbert Alber, however, argue that mutual

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54. See BARNARD, *supra* note 9, at 95 (explaining that goods produced in one Member State would have market access in all other Member States and citing the Commission’s response to *Cassis*); see also Commission, Communication from the Commission regarding the *Cassis de Dijon* judgment, 1980 O.J. C 256/2 (recognizing the *Cassis* decision and the application of the principle of mutual recognition; Opinion of Advocate General Mengozzi, *Carmen Media*, [2010] E.C.R. I-8149, ¶ 33 (categorizing mutual recognition as a tool aimed at guaranteeing market access across the European Union even in sectors with significant discrepancies in regulation, and stressing the importance of balance so that the Member State where the service is provided is not duplicating controls of the provider Member State)).

55. See Dawes & Struckmann, *supra* note 12, at 259 (“The concept of mutual recognition was developed by the [CJEU] as a way to facilitate market access for goods . . . [and] was later extended by the Court to other freedoms so as to ensure the achievement of the objectives of the common market in the absence of harmonization . . .” (citing *Säger v. Dennemeyer & Co. Ltd.*, Case C-76/90 [1991] E.C.R. I-4221)).

56. See *Santa Casa*, [2009] E.C.R. I-7633, ¶ 69 (holding that a Member State is entitled to regard regulations in other Member States as insufficient assurance that national consumers will be protected against crime and the other risks of gambling); see also *Dickinger & Ömer*, Case C-347/09, [2011] E.C.R. I\_\_\_\_, ¶ 96 (delivered Sept. 15, 2011) (not yet reported) (re-establishing that there is no duty of mutual recognition in this field); Georgios Anagnostaras, *Les Jeux Sont Faits? Mutual Recognition and the Specificities of Online Gambling*, 37 EUR. L. REV. 191, 192 (2012) (stating that gambling “escapes completely the application of the mutual recognition principle.”).

57. Opinion of Advocate General Bot, *Santa Casa*, [2009] E.C.R. I-7633, ¶¶ 245–47 (failing to see how increasing competition in the gambling market would lead to progress and development of the EU community and finding comparison between increased competition in gambling inapposite to increased competition in medical treatment); see Joined Opinion Advocate General Bot, *Ladbrokes and Betfair*, [2010] 3 C.M.L.R. 40, ¶¶ 15, 119–24 (concluding that the principle of mutual recognition should not apply to the gambling market and that a Member State is entitled to find another State’s gambling regulations insufficient protection against fraud and crime). But see Dawes & Struckmann, *supra* note 12, at 252 (arguing that this “gives the Member States *carte blanche* to impose unjustified restrictions on the provision of online gambling services by all EU-licences online gambling operators, regardless of the integrity of such operators”).

recognition should be applied to the gambling sector as it has been applied to other politically sensitive areas like criminal law.<sup>58</sup> As there is such great diversity in national regulation of gambling, mutual recognition may be hard for legislators and operators to apply because it would be difficult to recognize the validity of a public monopoly grant in a licensing system Member State or vice versa.<sup>59</sup> Some scholars believe this makes the case for harmonization more compelling.<sup>60</sup>

#### D. Actions Taken by the European Union Legislature

The intricate EU “ordinary legislative” process makes adopting EU-wide regulation difficult. The “ordinary legislative procedure” in the European Union involves multiple steps, initiated by the Commission and ending in enactment only if

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58. See, e.g., Opinion of Advocate General Ruiz-Jarabo Colomer, *Placanica*, [2007] E.C.R. I-1894, ¶ 130 (concluding that he shares AG Alber’s opinion that if an operator from one Member State meets the regulatory requirements applicable in another State, that should provide “sufficient guarantee of the integrity of the operator”); see also Opinion of Advocate General Alber, *Gambelli*, [2003] E.C.R. I-13031, ¶ 118 (discussing that gambling is regulated in all Member States on largely the same grounds, and concluding thus, if an operator is licensed in one Member State, that should be a sufficient guarantee of the operator’s integrity.); Anagnostaras, *supra* note 56, at 194–95 (arguing that the “it is *precisely* in the absence of legislative approximation that this principle comes into play” and commenting that mutual recognition has been applied successfully in criminal law (citing *Cassis de Dijon*, Case C-120/78, [1979] E.C.R. 649, ¶ 8; *Arblade*, Case C-376/96, [1999] E.C.R. I-8453)); Council Framework Decision 2002/584/JHA. O.J. L190/1 (June 13, 2002) (outlining the EU arrest warrant and surrender procedures between Member States); TFEU, *supra* note 3, art. 67(3) (ex art. 61 TEC and ex art. 29 TEU), 2008 O.J. C 115/47, at 97 (recognizing the application of mutual recognition of judgments in criminal matters).

59. Enchelmaier, *supra* note 31, at 624 (discussing the intricacies of applying mutual recognition and the fact that the principle mainly rests on an analysis of whether the aims of legislation in the Member State where the service is provided are being achieved by regulations in place in the Member State where the operator is based).

60. Dimitrios Doukas, *In a Bet There Is a Fool and a State Monopoly: Are the Odds Stacked Against Cross-Border Gambling?*, 36 EUR. L. REV. 242, 263 (2012) (“The inadequacy of the Court’s approach and the adverse impact of the divergences in national laws on the establishment and functioning of the internal market for gambling and associated services make the need for EU harmonization compelling.”); see also Dimitrios Doukas & Jack Anderson, *Commercial Gambling Without Frontiers: When the ECJ Throws, the Dice is Loaded*, 27 Y.B. EURO. L. 257 (2008) (describing the piecemeal approach to gambling regulation in the current absence of minimum harmonization as “ultimately self-defeating”).

the European Parliament and Council reach an agreement.<sup>61</sup> This process of joint action on legislation makes regulating politically sensitive issues like gambling even more complicated and the possibility of EU-wide harmonization seem unlikely at this time.<sup>62</sup>

Although gambling regulation is somewhat difficult to implement due to the complexities of the EU legislative process and the policy concerns of Member States, gambling regulation has consistently been on the institution's agenda. The Commission first suggested that regulation of gambling should be subject to the single market regime in 1991, but did not press the issue due to some Member States' reluctance.<sup>63</sup> Although the European Parliament and Council adopted the E-commerce Directive in 2000, gambling and games of chance were expressly excluded from that Directive's coverage.<sup>64</sup> The issues of gambling regulation were highlighted in the Presidency of the Council progress reports in both 2008 and 2009, and Parliament in 2009 called on Member States to cooperate on solving

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61. See DASHWOOD, *supra* note 31, at 73 (finding this "dual democratic basis is best reflected in the Union's 'ordinary legislative procedure'—previously known as co-decision—since it is based on an equal say between the European Parliament and the Council"); see also TFEU, *supra* note 2, art. 294 (ex art. 251 TEC), 2012 O.J. C 326, at 173–74 (renaming the co-decision process the "ordinary legislative procedure"). The Commission has the sole power to initiate a legislative draft. See TEU post-Lisbon, *supra* note 4, art. 17(2), 2012 O.J. C 326, at 25 ("Union legislative acts may only be adopted on the basis of a Commission proposal, except where the Treaties provide otherwise."); see also Dashwood, *supra* note 32, at 72 (stating this rule was developed to ensure legislative powers would only be initiated by "the Union institution with a duty to act independently and without regard to any specific national interests."). Then the European Parliament and the Council begin the process of co-decision. See Dashwood, *supra* note 32, at 74 Figure 4.1 (displaying a graph of the ordinary legislative procedure); see also Hartley, *supra* note 3, at 37–38 (describing the legislative process whereby a Commission proposal is debated and amended by both the European Parliament and the Council).

62. See Rose M. Lastra, *Banking Union and Single Market: Conflict or Companionship?*, 36 *FORDHAM INT'L. L.J.* 1190, 1194–1201 & nn. 7–33 (outlining recent example of the complex legislative process in the context of creating a banking union).

63. See Opinion of Advocate General Ruiz-Jarabo Colomer, *Placanica*, [2007] E.C.R. I-1894, ¶ 145 (attempting on the Commission's part to regulate gambling based on the results in a study); see also Presidency Conclusions, Edinburgh, Dec. 11–12, 1992, DOC/92/8 (Dec. 13, 1992) (deciding on the Council's part not to harmonize gambling regulation).

64. Directive 2000/31/EC of the European Parliament and of the Council on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market.

discrete issues like fraud prevention, age minimums for online gambling, and minimum requirements for consumer protection.<sup>65</sup>

The Commission's 2011 Green Paper surveyed the current policy challenges in regulating online gambling and was designed to launch a dialogue about possible solutions to the lack of consistency.<sup>66</sup> A year later, the Commission's Communication entitled "Towards a comprehensive European framework for online gambling" set out recommendations on consumer protection and advertising in gambling.<sup>67</sup> The Communication also announced the Commission's decision to re-launch infringement proceedings against nine Member States and to investigate legislation in twenty Member States.<sup>68</sup> Proceedings brought by the Commission against Member States for infringements of Treaty or secondary rules are a vital mode of enforcing EU law.<sup>69</sup> The Commission soon fulfilled the promise of the 2012 Communication and reinvigorated the infringement proceedings against noncompliant Member States in November 2013.<sup>70</sup> These are the first Commission

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65. Progress Report of the French Presidency of the EU, Gambling and Betting: Legal Framework and Policies in the Member States of the EU, DOC/16022/08 (Nov. 27, 2008); *see also* Progress Report of the Swedish Presidency of the EU, Legal Framework for Gambling and Betting in the Member States of the European Union, , DOC/16571/09 (Nov. 25, 2009); European Parliament resolution of 10 March 2009 on the integrity of online gambling, 2008/2215(INI); Dawes & Struckmann, *supra* note 12, at 254 (summarizing that the Report and Resolution reject complete harmonization of online gambling regulation, but both call on Member State cooperation on a number of issues).

66. *See* Green Paper, *supra* note 3, at 3 (highlighting that the goal of the Green Paper is to launch a public discussion on policy challenges and issues with respect to the growth of online gambling in the European Union).

67. Communication from the Commission, Towards a Comprehensive European Framework for Online Gambling, COM (2012) 596 final (Oct. 23, 2012).

68. *See id.* (re-launching proceedings against Germany, Greece, the Netherlands, Hungary, Greece, Sweden, and Finland).

69. *See* TFEU, *supra* note 2, art. 258 (ex art. 226 TEC), 2012 O.J. C 326, at 160 (creating the Commission's power to bring infringement proceedings against noncompliant Member States); *see also* DASHWOOD, *supra* note 31, at 135 (finding the power given to the Commission to enforce and supervise Member State compliance with their obligations to the Treaties to be distinguished from other supranational orders).

70. Commission, Commission Requests Member States to Comply with EU law when Regulating Gambling Services, IP/13/1101 (2013).

infringement proceedings to remove obstacles to free trade in gambling regulation since 2008.<sup>71</sup>

At the same time the Commission re-launched infringement proceedings, the European Parliament adopted a resolution on online gambling in September 2013.<sup>72</sup> This resolution stressed the unique risks online gambling poses to consumer health, and it recommended that uniform, EU-wide common online security standards be adopted and administrative cooperation be increased.<sup>73</sup> Presumably the Council's silence on the matter of gambling regulation since the 1992 decision not to harmonize speaks to its reluctance to initiate legislation in this area. However, the recent legislative discussion surrounding gambling regulation may lead to minimum harmonization, or, at the very least, increased protection of the internal market through infringement proceedings.

*E. Development of a Compatibility Analysis for Gambling Regulations by the CJEU*

The CJEU has largely shouldered the burden of reconciling the free market principles of EU law and differing national gambling regulations. Part I.E.1 summarizes the CJEU's basic compatibility framework applied to disputes regarding gambling regulations. Part I.E.2 describes the earliest, highly deferential preliminary rulings on gambling regulation starting with *Schindler* in 1994 that preceded the conflicting case-law discussed in Part II. Next, Part I.E.3 addresses the three German cases the Grand Chamber delivered on September 8, 2010 (the "German Triad"), which followed the cases in Part II and reinvigorated analysis used in *Gambelli*. Part I.E.4 considers this continued trend of the CJEU adhering closely to the ideals of the fundamental freedoms by demanding support for the

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71. See Commission, Commission Acts to Remove Obstacles to Provision of Gambling Services in *Greece* and *The Netherlands*, IP/08/330 (2013).

72. European Parliament Resolution on Online Gambling in the Internal Market, 2012/2322(INI) (Sept. 10, 2013). The Resolution was adopted 572 votes to 79, with 61 abstentions. *Id.*

73. *Id.*; see also Committee on the Internal Market and Consumer Protection, Report on Online Gambling in the Internal Market 2012/2311 (INI) (Ashley Fox, Rapporteur).

legislature's policy objectives and employing a searching analysis of the proportionality of gambling regulations with these objectives. Next, Part I.E.5 explores the potential resurrection of mutual recognition in the gambling market in the 2012 *HIT and HIT Larix* judgment. Finally, Part I.E.6 examines two recent decisions in which the CJEU implicitly argues for the more liberalized licensing systems that are more faithful to the Treaty of Lisbon principles.

### 1. The Compatibility Framework Applied to Preliminary Rulings Regarding Gambling Regulations in the CJEU

Over the past two decades, the CJEU has consistently found national regulations on gambling to be restrictions on the fundamental freedoms justified by reasons of overriding public interest.<sup>74</sup> These restrictions must not discriminate on the basis of nationality and must be proportionate.<sup>75</sup> The proportionality analysis requires that the national regulation be a suitable and necessary means to the stated end.<sup>76</sup>

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74. See *Santa Casa*, [2009] E.C.R. I-7633, ¶ 57 (finding that there are "significant moral, religious, and cultural differences between the Member States," and thus it is in within each Member States' discretion to decide what regulation is needed to protect cited interests); see also *Sjöberg & Gerdin*, Joined Cases 447 & 448/08, [2010] E.C.R. I-6921, ¶ 37 (observing that in gambling regulation there are significant differences between Member States, and allowing that it is up to each State to enact legislation that protects different interests); Green Paper, *supra* note 3, at 11 (citing certain overriding interests like consumer protection that have been recognized by the CJEU as justifications for restrictions on free provision of services).

75. See TEU post-Lisbon, *supra* note 4, art. 5(4), 2012 O.J. C 326, at 18 ("(4) Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties"); see also *Placanica*, [2007] E.C.R. I-1891, ¶¶ 48, 58 (holding that restrictive legislation must satisfy the proportionality analysis); *Sporting Exchange Ltd. (t/a Betfair) v. Minister van Justitie*, Case C-203/08, [2010] 3 C.M.L.R. 41, ¶ 29 (establishing that national courts must determine that the regulations are proportionate to the stated objectives).

76. See *Gebhard*, [1995] E.C.R. I-4165, ¶ 37 ("[N]ational measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfill four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it."); see also *Gambelli*, [2003] E.C.R. I-13031, ¶¶ 64–65 (citing the suitability and necessity language of *Gebhard*); *Lindman*, [2003] E.C.R. I-13543, ¶ 25 (finding restrictions must be analyzed for proportionality and appropriateness under *Gebhard*). Suitability requires that the means employed must be adequate or appropriate to attain the stated ends. See BARNARD, *supra* note 9, at 177 (citing *NV United Foods and PVBA Aug. Van den Abele v. Belgium*, Case

Where the Member State adopts a system of licensing of gambling operators, the CJEU requires transparency and an impartial, competitive procedure for granting licenses.<sup>77</sup> Monopolies and quotas on the number of licensed operators can be justified, but they must reflect a “genuine diminution in gambling opportunities” and limit gambling in a “consistent and systematic manner” across the sector.<sup>78</sup> Also, because the national legislatures often do not distinguish in their regulations among gambling marketing channels, the assessment of compatibility carried out by the CJEU does not distinguish between online and *in situ* gambling.<sup>79</sup>

The CJEU has, however, recognized that the risks of online gambling to consumers are different and potentially greater than those posed by land-based gambling due to the constant accessibility of Internet and the lack of contact between player and operator.<sup>80</sup> Though the CJEU has acknowledged the

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132/80, [1981] E.C.R. 995, ¶ 28). When considering necessity, the CJEU balances the burden placed on the regulated conduct against the benefits to the stated objective pursued by the Member State. See BARNARD, *supra* note 9, at 177; see also HARTLEY, *supra* note 2, at 123 (arguing that the necessity analysis is in place to safeguard against overbroad Union legislation).

77. See Doukas, *supra* note 60, at 244 (describing the principles applied to limit restrictions on freedoms and the procedure required of licensing schemes); see also Placanica, [2007] E.C.R. I-1891, ¶¶ 61–64 (outlining the requirements of licensing tender procedures such as impartiality).

78. *Questore di Verona v. Diego Zenatti* (“Zenatti”), Case C-67/98, [1999] E.C.R. I-07289, ¶¶ 35–36 (finding a limitation on gambling acceptable if it aims at bringing about a “genuine diminution in gambling opportunities”); see *Gambelli*, [2003] E.C.R. I-13031, ¶¶ 62, 67 (citing the “genuine diminution” language in *Zenatti* and reiterating that restrictions based on overriding policy justifications must limit gambling activity “in a consistent and systematic manner”); *Placanica*, [2007] E.C.R. I-1891, ¶ 53 (combining the language in *Zenatti* and *Gambelli* to hold that restrictions must aim at “a genuine diminution of gambling opportunities and [limiting] activities in that sector in a consistent and systematic manner”).

79. *Zeturf*, [2011] 3 C.M.L.R. 30, ¶ 76 (applying an “overall assessment” instead of a distribution-channel-specific assessment); see also Anagnostaras, *supra* note 56, at 199 (arguing that *Zeturf* makes it clear that online gambling is not a separate market but a separate distribution channel of the greater gambling market).

80. See *Ladbrokes*, [2010] 3 C.M.L.R. 40, ¶ 55 (“Online games of chance involve different and more substantial risks of fraud against consumers mainly due to lack of direct contact.”); see also *Santa Casa*, [2009] E.C.R. I-7633, ¶ 70 (contending that the lack of contact between the operator and consumer involves a “more substantial” risk of fraud compared to *in situ* gambling); Opinion of Advocate General Bot, *Santa Casa*, [2009] E.C.R. I-7633, ¶ 267 (finding the “permanent availability of the opportunity to play, the frequency of wins, its enticing or attractive nature, the possibility of staking large sums, the availability of credit in order to play, the location of games at places



possibly of greater social risks posed by online gambling, it applies the same analysis to both online and conventional gaming legislation.

## 2. The Early Preliminary Rulings on Compatibility

The basic guiding principles of the compatibility analysis were developed in highly deferential judgments relating to regulations of territory-based gambling operations, and their application to online gambling operations is not always clear. This developmental period in the CJEU's case law in the 1990s led to the view that Member States have a large margin of discretion in regulating gambling on the basis of overriding policy objectives.<sup>81</sup> In *Her Majesty's Customs and Excise v. Gerhart Schindler and Jörg Schindler*, the CJEU accepted the United Kingdom's justifications for the regulation without any analysis of the social repercussions of gambling.<sup>82</sup> By the end of the decade the CJEU began to move towards a stricter analysis with the decision in *Questore di Verona v. Diego Zenatti*.<sup>83</sup> There, the

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where people can play on an impulse and, finally, the fact that there is no information campaign regarding the risks of gaming" to be especially troubling aspects of online gaming).

81. *Zenatti*, [1999] E.C.R. I-07289, ¶¶ 33–34 (finding gambling regulation to fall "within the margin of appreciation" the CJEU grants national authorities); see *Associação Nacional de Operadores de Máquinas Recreativas (Anomar) and Others v. Estado português (Anomar)*, Case C-6/01, [2003] E.C.R. I-08621, ¶¶ 78, 87 (recognizing the discretion granted to Member States in relation to gambling regulation). *Anomar* dealt with a challenge to Portuguese monopoly regulations. See *id.* ¶¶ 2, 7, 28 (explaining that Portuguese national law grants the right to operate gambling facilities solely to the State and the action at hand challenges this regulatory framework). *Anomar* was decided two months prior to *Gambelli* by the Third Chamber, but lacked the more searching analysis employed by the full Court of Justice in *Gambelli*. See *id.* ¶ 1 (receiving the reference on January 8, 2001 and deciding the case on September 11, 2003). But see *Gambelli*, [2003] E.C.R. I-13031, ¶ 1 (receiving the reference on June 22, 2001, and deciding the matter on November 6, 2003).

82. *Schindler*, [1994] E.C.R. I-1078, ¶¶ 57–59, 63 (holding crime prevention and consumer protection to justify restriction on the freedom to provide services without examining justifications further or calling for support on the record); see Doukas & Anderson, *supra* note 60, at 240 (finding that the CJEU in *Schindler* did not even apply a proportionality test).

83. See *Zenatti*, [1999] E.C.R. I-07289. But see Julia Hörnle, *Online Gambling in the European Union: A Tug of War Without a Winner?* 10 (Queen Mary Univ. of London, School of Law, Legal Stud. Research Paper No 48/2010), available at <http://ssrn.com/abstract=1593249> (arguing that *Zenatti* applies the same "soft" proportionality test as *Läämä* and discusses gambling in the same "moral, religious, and cultural" framework as *Schindler* which grants Member States great discretion).

CJEU asked the national court to examine the policy objectives for a “genuine” desire to reduce gambling, and to ensure that the tax revenues were only an “incidental” benefit to reduction and channeling of gambling activities.<sup>84</sup> These early rulings of the CJEU from 1994 and 1999 established that gambling regulations restrict the provision of services but were highly deferential to the prerogatives of the national legislatures in regulating gambling activity.<sup>85</sup> This highly deferential treatment granted to the Member States far exceeded the scope of the exceptions granted by Articles 52 and 61 TFEU to the fundamental freedoms and was not true to the goals of the internal market.

The CJEU reasoned in *Schindler* in 1994 that because of the differing moral and cultural perceptions of gambling from nation to nation, the restrictions imposed by the United Kingdom on gambling activity were justified on social objectives grounds.<sup>86</sup> Thus, as long as gambling regulations are applied evenhandedly, it is within a Member State’s discretion to restrict the activity.<sup>87</sup>

In 1999, the CJEU in *Markku Juhani Läärä, Cotswold Microsystems Ltd. and Oy Transatlantic Software Ltd. v. Kihlakunnansyyttäjä (Jyväskylän) and Suomen valtio (Finnish State)*

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84. See *Zenatti*, [1999] E.C.R. I-07289, ¶¶ 35–36 (calling for the “genuine diminution in gambling opportunities” and the guarantee that financial benefits are only “incidental” to the larger policy justifications for restricting gambling within a Member State); see also Doukas & Anderson, *supra* note 60, at 242 (characterizing the deference granted to the national court as a “mitigation” of the proportionality test).

85. See *SPORTS BETTING*, *supra* note 2, at 34 (discussing the CJEU’s position in *Schindler* as “erring on the side of national regulations and justifications” for restrictive licensing and monopolies); see also Doukas & Anderson, *supra* note 60, at 242 (assessing the preliminary rulings on gambling regulations from *Schindler* to *Zenatti* as a “disappointment”).

86. *Schindler*, [1994] E.C.R. I-1078, ¶¶ 57–59, 63 (finding the prevention of crime and protection of consumers to justify restriction on the freedom to provide services). In this ruling, the CJEU also confirmed for the first time that gambling is an economic activity that falls within the purview of the Treaty. *Id.* ¶¶ 19, 25, 34 (finding that “lotteries constitute an economic activity, within the meaning of the Treaty” and are to be regarded as services within the meaning of the Treaty.). This case concerned German agents of a lottery advertising and possibly importing tickets into the United Kingdom in violation of regulations on gambling. *Id.* ¶¶ 3–5 (stating that the Schindlers sent applications via mail to the United Kingdom from the Netherlands for the German lottery *Süddeutsche Klassenlotterie* (“SKL”) in violation of UK law).

87. *Id.* ¶¶ 47–48, 52, 61 (regarding the legislation as not discriminatory on the basis of nationality).

(“*Läärrä*”) again granted a national legislature great deference when it found a monopoly that completely eliminates competition and progress in the marketplace to be proportionate to the Finnish legislature’s goals of protecting consumers against the dangers of gambling and preventing fraud.<sup>88</sup> Thus, some scholars have argued that with *Läärrä* the CJEU adopted a “soft” proportionality test that grants Member States substantial discretion in promulgating restrictions on the gambling market.<sup>89</sup>

Also in 1999, the CJEU issued a ruling to the Italian courts in *Zenatti* that emphasized the discretion granted to the Member States and did not examine the proportionality of the Italian regulations in depth.<sup>90</sup> The CJEU found the Italian licensing restrictions to infringe on the freedom to provide services but did not find them impermissible.<sup>91</sup> Limiting gambling to an exclusive group of operators could channel and control gambling opportunities, and this limitation could be acceptable if it reflects a desire to bring about “a genuine diminution in

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88. Markku Juhani Läärrä, *Cotswold Microsystems Ltd. and Oy Transatlantic Software Ltd. v. Kihlakunnansyyttäjä (Jyväskylä) and Suomen valtio (Finnish State) (Läärrä)*, Case C-124/97, [1999] E.C.R. I-06067, ¶¶ 28–29, 31, 33, 42–43 (finding the monopoly not to be disproportionate or to “go beyond what is necessary in order to achieve” the legislature’s stated objectives). The case involved a British gaming machines exporter who was fined for selling machines without a license in Finland, where the Finnish government had granted a monopoly on slot machines to a non-profit. *Id.* ¶¶ 3–6 (stating that the gaming machine monopoly license grant was specific to the distribution and operation of slot machines in Finland).

89. See BARNARD, *supra* note 9, at 392 (“[I]n *Läärrä* [the CJEU] did examine proportionality but its approach was remarkably hands off.”); see also Hörnle, *supra* note 83, at 9 (calling the proportionality analysis in *Läärrä* “soft”); SPORTS BETTING, *supra* note 2, at 36 (discussing the CJEU’s stance on moral corruption in gambling and how easily it granted latitude to the national authorities).

90. *Zenatti*, [1999] E.C.R. I-07289, ¶¶ 14–16, 33–34 (observing the deference granted to national authorities in regulating gambling activity and noting the need for proportionality without actually engaging in an analysis). In *Zenatti*, an Italian agent for a British bookmaker was found to violate the Italian regulations that limit sports betting to a small number of licensed operators. *Id.* ¶¶ 3–7 (outlining the regulatory scheme in Italy, which Mr. Zenatti was found by Italian authorities to be violating). The Italian legislation’s stated objectives were fraud prevention, consumer protection from the harms of gambling, and preventing gambling from being a source of private profit. *Id.* ¶¶ 30–31 (summarizing policy objectives cited by the Italian legislation in implementing gambling regulations).

91. *Id.* ¶¶ 26–27 (finding the legislation non-discriminatory but a restriction on the freedom to provide services).

gambling opportunities.”<sup>92</sup> Furthermore, protecting the taxes levied on bookmaking in Italy must only be an “incidental beneficial consequence” and not the true purpose behind the legislation.<sup>93</sup>

This line of cases granted a large margin of discretion to Member States. Here, the Member States were allowed to regulate gambling in contravention of the fundamental freedoms, and the CJEU sometimes did not even employ a proportionality analysis.<sup>94</sup> Following this highly deferential period, the CJEU developed the two conflicting compatibility frameworks discussed in Part II of this Note.

### 3. The Treaty of Lisbon Comes into Force and the September 8th German Triad

The Treaty of Lisbon entered into force on December 1, 2009, which altered the structure of the European Union in order to better face global challenges and uphold the core values of the European Union’s institutions.<sup>95</sup> In light of this change, the Grand Chamber released a triad of rulings on gambling regulation compatibility in 2010 that realigned the CJEU’s judicial policy in this field after the two conflicting frameworks employed in *Gambelli* and in *Santa Casa* discussed in Part II of this Note.<sup>96</sup> The German Triad reestablished the rigorous proportionality and consistency analyses employed in

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92. *Id.* ¶¶ 35–36 ([A] limitation is acceptable only if . . . it reflects a concern to bring about a genuine diminution in gambling opportunities . . . ).

93. *Id.* ¶ 36 (citing language in *Schindler* in claiming that financial benefits cannot be the primary motivation behind legislation that restricts the freedom to provide services).

94. See Doukas & Anderson, *supra* note 60, at 240 (discussing the lack of a proportionality test in *Schindler*); see also SPORTS BETTING, *supra* note 2, at 34 (arguing the CJEU in *Schindler* “err[ed] on the side of national regulations and justifications” for restrictive licensing and monopolies).

95. See *Taking Europe into the 21st Century*, EUROPA, [http://europa.eu/lisbon\\_treaty/take/index\\_en.htm](http://europa.eu/lisbon_treaty/take/index_en.htm) (stating that in this ever more interconnected world, the Treaty of Lisbon alters the structures of the EU’s institutions and thus “the EU is more democratic and its core values are better served.”).

96. See Winner Wetten GmbH, Bürgermeisterin der Stadt Bergheim (*Winner Wetten*), Case C-409/06, [2010] E.C.R. I-8015; see also Markus Stoß v. Wetteraukreis (*Stoß and Others*), Joined Cases 316, 358–360, 409, & 410/07, [2010] E.C.R. I-8069; Carmen Media Group Ltd. v. Land Schleswig-Holstein, Innenminister des Landes Schleswig-Holstein (*Carmen Media*), Joined Cases 316, 358–360, 409, & 410/07, [2010] E.C.R. I-8149.

*Gambelli* and further reasserted the primacy of EU law.<sup>97</sup> The Grand Chamber returned to a more faithful interpretation of the Treaties, allowing the Member States' the ability to restrict the provision of services.

On September 8, 2010, the Grand Chamber gave preliminary rulings in three major cases: *Winner Wetten GmbH, Bürgermeisterin der Stadt Bergheim, Markus Stoß v. Wetteraukreis* ("Stoß and Others"), and *Carmen Media Group Ltd. v. Land Schleswig-Holstein, Innenminister des Landes Schleswig-Holstein*.<sup>98</sup> *Winner Wetten* dealt with the continued application of a German public monopoly statute during a transitional period to a regulatory scheme more compliant with EU law.<sup>99</sup> In *Stoß and Others*, the defendants were agents of companies licensed in other Member States who were operating in Germany in contravention of the German monopoly system.<sup>100</sup> In *Carmen Media*, the CJEU analyzed the compatibility of a total prohibition

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97. See SPORTS BETTING, *supra* note 2, at 74 (deeming *Carmen Media* a "pivotal moment" for the CJEU's jurisprudence, the future of gambling in the European Union, and "an eventual liberalisation of the industry"); see also *Winner Wetten*, [2010] E.C.R. I-8149, ¶ 53 ("[I]n accordance with the principle of the precedence of Union law, provisions of the Treaty and directly applicable measures of the institutions have the effect, in their relations with the internal law of the Member States, merely by entering into force, of rendering automatically inapplicable any conflicting provision of national law." (citing *Amministrazione delle Finanze dello Stato v. Simmenthal SpA*, Case 106/77, [1978] E.C.R. 629, ¶ 17; *The Queen v. Sec'y of State for Transp. ex parte Factortame*, Case C-213/89, [1990] E.C.R. I-2433, ¶ 18)).

98. See *Winner Wetten*, [2010] E.C.R. I-8149; see also *Stoß and Others*, Joined Cases 316, 358-360, 409, & 410/07, [2010] E.C.R. I-8069; *Carmen Media*, [2010] E.C.R. I-8149.

99. *Winner Wetten*, [2010] E.C.R. I-8149, ¶¶ 63-67 (describing caselaw that allows for the continued application of a national law found to be incompatible to EU law for an interim period but finding that inapplicable to the case at hand). The gambling operator *Winner Wetten* was found to be operating in violation of the German non-profit monopoly grant. *Id.* ¶¶ 15-18 (describing *Winner Wetten*, a gambling operator established in Malta, and the company's administrative complaint brought against German officials). *Winner Wetten* again raised the issue of inconsistency because the German authorities advertised and encouraged consumers to use their gambling services while claiming to pursue the overriding objective of consumer protection. *Id.* ¶ 20 (citing the national court's consideration of the inconsistency between a restrictive consumer protection policy and encouraging consumers to participate in the authorized gambling activities).

100. *Stoß and Others*, [2010] E.C.R. I-8069, ¶¶ 14, 16, 28-30 (outlining the factual and legal background of the preliminary ruling and finding the multiple defendants to be agents of companies operating without authorization in Germany).

on online gambling with the German monopoly system during its transitional period.<sup>101</sup>

Most notably, the Grand Chamber in *Winner Wetten* began the discussion of the substance of the law with a forceful reiteration of the idea of primacy: provisions of the Treaty and secondary law automatically render inapplicable any conflicting national legislation.<sup>102</sup> Moreover, the Grand Chamber discussed the principle of cooperation, which obligates Member States to apply EU law.<sup>103</sup> Thus, the ruling—that the public monopoly regulation was a restriction that could not continue to apply during a transitional period because the regulation did not consistently and systematically limit gambling—came as no surprise.<sup>104</sup>

The Grand Chamber's September 8th German Triad rulings reaffirm the primacy of EU law in *Winner Wetten* and establish that a Member State, here Germany, cannot violate EU law even briefly. In *Stoß and Others* and *Carmen Media*, the Grand Chamber stressed the importance of consistency in the means of national gambling regulation to the legislature's stated objectives.<sup>105</sup> Any restriction of the free provision of services must be consistent and proportionate to the stated overriding

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101. *Carmen Media*, [2010] E.C.R. I-8149, ¶¶ 23–24, 111 (detailing the unsuccessful license application of Gibraltar-based online gambling operator Carmen Media in Land Schleswig-Holstein, in the context of transitional measures applied at the time of the challenge in Germany).

102. *Winner Wetten*, [2010] E.C.R. I-8149, ¶ 53 (“[I]n accordance with the principle of the precedence of Union law, provisions of the Treaty and directly applicable measures of the institutions have the effect, in their relations with the internal law of the Member States, merely by entering into force, of rendering automatically inapplicable any conflicting provision of national law.” (citing *Simmenthal*, [1978] E.C.R. 629, ¶ 17; *The Queen v. Sec’y of State for Transp. ex parte Factortame*, [1990] E.C.R. I-2433, ¶ 18)).

103. *Id.* ¶ 55 (holding that Member States are obligated to apply Union law under the principle of cooperation (citing *Simmenthal*, [1978] E.C.R. 629, ¶¶ 16, 21; *Factortame*, [1990] E.C.R. I-2433, ¶ 19)).

104. *Id.* ¶ 69 (finding the regulation to be a restriction on the freedom of establishment and the free provision of services).

105. Though the CJEU in *Stoß and Others* found that a monopoly also could be justified because it allows greater control over the gambling sector and its inherent risks, it could only be justified in the context of a high level of consumer protection that the regulation consistently and systematically pursues. *Stoß and Others*, [2010] E.C.R. I-8069, ¶¶ 83, 95–98 (holding restrictions on gambling activities can only be justified only consistently and systematically pursuing an overriding public policy).

public policy.<sup>106</sup> The CJEU reaffirmed, however, its belief that mutual recognition was inapplicable to the field of gambling regulation at this point in time.<sup>107</sup> Again, the CJEU reiterated the unique risks associated with gambling online and posited that in light of this, regulating this channel of gambling in a different manner may be justified.<sup>108</sup>

#### 4. The Closer Examination of Policy Objectives and the Reinforcement of the Principle of Non-discrimination

In accordance with this judicial posture, the Fourth Chamber and Eighth Chamber released rulings from 2010 to 2012 calling for consistency and more evidence of the necessity of gambling regulations in Member States. Furthermore, the CJEU took a firm stance against gambling regulations that discriminated on the basis of nationality. On September 9, 2010, one day after the Grand Chamber handed down three preliminary rulings regarding the German regulatory scheme, the Fourth Chamber issued a preliminary ruling regarding

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106. See *Carmen Media*, [2010] E.C.R. I-8149, ¶ 63 (finding disparities in gambling regulation, for example, where certain games are subject to a public monopoly and others to a licensing system, does not render the regulation unsuitable). It is within the Member State's discretion to determine if it is necessary to prohibit or restrict gambling activities. *Id.* ¶ 46 (granting discretion to the Member States to determine what regulation is necessary and finding the necessity and proportionality must "be assessed having regard to the objectives pursued and the level of protection sought . . ."). However, the CJEU in *Stoß and Others* and *Carmen Media* was particularly concerned with inconsistent advertisements for monopolies that trivialized gambling or gave it a positive image, especially if the legislature's stated objective is reduction of gambling. *Stoß and Others*, [2010] E.C.R. I-8069, ¶ 103 (concluding that advertising to channel consumers cannot trivialize gambling and give the activity a positive image); *Carmen Media*, [2010] E.C.R. I-8149, ¶ 71 (regarding the expansionist policy unsuitable for pursuing a reduction in gambling opportunities).

107. See *Stoß and Others*, [2010] E.C.R. I-8069, ¶¶ 109–10, 112 (rejecting the application of mutual recognition in this context and finding the question inappropriate because "a duty mutually to recognise authorisations issued by the various Member States cannot exist having regard to the current state of EU law").

108. *Carmen Media*, [2010] E.C.R. I-8149, ¶ 111 (holding that a ban on online gambling may be a suitable means of protecting consumers and fighting gambling addiction); see also *id.* ¶¶ 101–03 (highlighting particular risks associated with online gambling—especially the lack of direct contact, the ease of access, the round-the-clock availability, the isolation, the anonymity, and the absence of social control); *Stoß and Others*, [2010] E.C.R. I-8069, ¶ 84 (indicating the referring national court was apprehensive about applying the public monopoly framework to the Internet where compliance may be harder to ensure).

Austrian regulations in *Ernst Engelmann*.<sup>109</sup> The following year, in 2011, the Eighth Chamber issued a preliminary ruling in *Zeturf Ltd. v. Premier Ministre* regarding the French non-profit horserace-betting monopoly.<sup>110</sup> The same year, the Fourth Chamber issued a ruling in *Dickinger & Ömer*, stating as in *Zeturf* that in order to find a monopoly justified and necessary, the regulations must guarantee a “particularly high level of protection.”<sup>111</sup> In February 2012, the Fourth Chamber again issued a preliminary ruling on online gambling regulations in *Costa & Cifone*, in which protectionist Italian licensing law required a minimum distance between existing operators and previous applicants.<sup>112</sup> This series of rulings adhered closely to

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109. *Ernst Engelmann*, Case C-64/08, [2010] E.C.R. I-8219, ¶¶ 2–3. In *Engelmann*, a German national was operating gambling in Austria in contravention of Austrian legislation. *Id.* ¶¶ 17–18 (outlining the factual background of the dispute in the main proceedings). Here, the CJEU found the Austrian regulation of gambling to be discriminatory and disproportionate and therefore incompatible with EU law. *Id.* ¶¶ 28, 32–37 (finding the regulation a restriction on the freedom of establishment, specifically secondary establishment in Austria, and discriminatory against businesses headquartered in other Member States).

110. *Zeturf*, [2011] 3 C.M.L.R. 30, ¶¶ 1–2, 26–27 (describing the appeal to the French government by Zeturf, a Maltese-licensed online operator that provided horserace-betting services via the Internet in France, to repeal the monopoly grant). Note that at the time of this ruling, the French legislation at issue had already been amended to a licensing scheme, but the ruling nevertheless stands for the principle that Member States must maintain consistency and provide support for the harms cited on the record. See Commission, On-line Gambling: Commission Welcomes France’s Decision to Open Its Gambling Market and Closes Infringement Procedure, IP/10/1597 (2010); see also Loi n. 2010-476 de mai 2010 relative à l’ouverture à la concurrence et à la régulation du secteur des jeux d’argent et de hasard en ligne [Law 2010-476 of May 12, 2010 on the Introduction of Competition and Sector Regulation of Gambling and Online Gambling], available at <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000022204510> (allowing cross-border provision of services through a licensing system as opposed to the previous monopoly system).

111. *Dickinger & Ömer*, [2011] E.C.R. I\_\_\_\_, ¶ 54 (delivered Sept. 15, 2011) (not yet reported) (holding that it is for the referring court to determine the intent, objectives, and necessity of the restrictive regulations). The defendants alleged that the primary objective of the Austrian legislature was increasing tax revenue, whereas the government asserted that its main objective was consumer protection. *Id.* ¶¶ 2–5, 26, 52–53, 80–81, 84 (discussing the allegations of the defendants in the case who operated the Maltese licensed website bet-at-home.com in contravention of Austrian law that, among other things, (1) required the seat of the operation to be in Austria, (2) considered the maximization of public revenue when awarding concessions, and (3) prohibited setting up branches in other Member States).

112. *Costa & Cifone*, Joined Cases 72 & 77/10, [2011] E.C.R. I\_\_\_\_, ¶¶ 58, 66, 89 (delivered Feb. 16, 2012) (not yet reported) (describing the Italian licensing law and discussing the measures as protectionist). Mr. Costa and Mr. Cifone were agents of



the principles laid down in the Treaties and the text of Articles 56 and 61.

This series of rulings by the CJEU is faithful to Articles 56 and 61 because the rulings stress the principle of non-discrimination and the need for transparency.<sup>113</sup> The Treaty of Lisbon calls for the free provision of services and allows restrictions on the provision of services in the public interest only if they did not discriminate on the basis of nationality.<sup>114</sup> Here, the CJEU called for more facts on the record to demonstrate the harms linked to gambling in France and Austria.<sup>115</sup> The CJEU again demanded consistency between the objectives cited by the national legislatures and the means chosen to execute these objectives.<sup>116</sup> The call for more evidence

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Stanley International operating in Italy. *Id.* ¶ 2. In breach of EU law, Stanley International was previously excluded from the Italian tendering procedure in 1999, and in 2006, after the Italian authorities were uncooperative in tendering procedures, brought suit. *Id.* ¶¶ 12–13, 20–27.

113. *Engelmann*, [2010] E.C.R. I-8219, ¶¶ 32–33 (holding that regulations requiring a gambling company to have its seat in Austria are discriminatory against companies established in other Member States and a restriction against free establishment in Austria); see Doukas, *supra* note 60, at 262 (finding the regulations in *Engelmann* “manifest excesses of national discretion” incompatible with the Treaty); *Engelmann*, [2010] E.C.R. I-8219, ¶¶ 37–39, 49–58 (finding the Austrian regulation disproportionate as there are other methods available to monitor operator’s activities—especially via the Internet—and emphasizing the lack of transparency in the license-tendering procedures because they were not based on objective criteria known in advance, that is neither used arbitrary nor applied in a discriminatory manner); *Costa & Cifone*, [2011] E.C.R. I\_\_\_\_, ¶¶ 54–56 (delivered Feb. 16, 2012) (demanding that national authorities comply with the principles of equal treatment and non-discrimination in tendering procedures and maintain transparency). All rules and requirements of the tendering procedure ought to be clear and precise so that applicants have all the relevant information on hand when considering their tender offer. *Id.* ¶ 73. This principle is further bolstered by the principle of legal certainty, which calls for predictability in the law. *Id.* ¶ 74.

114. See TFEU, *supra* note 2, art. 56 (ex art. 49 TEC), 2012 O.J. C 326, at 70 (enacting the free provision of services); see also *id.* art. 61 (ex art. 54 TEC), at 71 (allowing derogations from article 56 so long as the regulations do not discriminate on the basis of nationality).

115. *Zeturf*, [2011] 3 C.M.L.R. 30, ¶¶ 70, 72 (instructing the French national court to determine whether, at the time the regulation was promulgated, there was evidence that criminal and fraudulent activities linked to gambling were an issue in France); see *Dickinger & Ömer*, [2011] E.C.R. I\_\_\_\_, ¶ 67 (delivered Sept. 15, 2011) (arguing an expansionist policy in Austria is inconsistent with the objective of consumer protection unless the scale of criminal activity is “significant”).

116. *Dickinger & Ömer*, [2011] E.C.R. I\_\_\_\_, ¶ 69 (delivered Sept. 15, 2011) (stating that there is a difference between a “restrained commercial policy seeking only

of the scale of the harms cited on the legislative record is indicative of the more protective stance the CJEU is taking on the fundamental freedoms.

### 5. The Potential Resurrection of the Principle of Mutual Recognition

In July 2012, the Fourth Chamber issued two important preliminary rulings dealing with Austrian and Latvian gambling regulation. In *HIT and HIT LARIX v. Bundesminister für Finanzen*, the CJEU's ruling regarding advertising in Austria for Slovenian casinos laid the foundation for the potential application of mutual recognition in the gambling sector.<sup>117</sup> Furthermore, in *Garkalns SIA v. Rīgas dome*, the CJEU called for a probing inquiry into the Latvian authorities' intent and objective in restricting the provision of gambling services in Riga.<sup>118</sup> This analysis of the consistency and proportionality of the national legislature's motives, coupled with the consideration of other neighboring Member States' interests, is more faithful to the European Union ideal and economic goals.

In *HIT and HIT Larix* the CJEU determined that the Austrian government cannot require other government's regulations to be identical to Austrian regulations, and it cannot assume that other Member States' regulations do not afford the same degree of consumer protection.<sup>119</sup> The CJEU stated that national gambling regulations established to be essentially

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to capture or retain the existing market" and a policy seeking to expand the overall market).

117. *HIT and HIT LARIX v. Bundesminister für Finanzen (HIT and HIT LARIX)*, Case C-176/11, [2012] E.C.R. I\_\_\_\_, ¶ 2–9 (delivered July 12, 2012) (not yet reported) (describing the background of the dispute where two Slovenian gambling operators applied for Austrian advertising permits and were rejected because the authorities found the Slovenian regulations less protective—a reason the CJEU found inadequate).

118. *Garkalns SIA v. Rīgas dome (Garkalns SIA)*, Case C-470/11, [2012] E.C.R. I\_\_\_\_, ¶¶ 1–2, 33 (delivered July 19, 2012) (not yet reported) (outlining the facts of the proceedings concerning the Riga authorities' refusal to grant Latvian operator Garkalns a license to operate an amusement arcade in a densely populated part of Riga).

119. *HIT and HIT LARIX*, [2012] E.C.R. I\_\_\_\_, ¶ 32 (delivered July 12, 2012) (stating that Slovenian regulations against gambling cannot be required to be identical to regulations in Austria and regarding the difference between national regulations as inadequate grounds for rejecting an advertising application); see *Santa Casa*, [2009] E.C.R. I-7633, ¶¶ 69–70 (rejecting the application of mutual recognition in the online gambling field).

equivalent is more loyal to the Treaties' economic goal of establishing a free market than allowing disparate and discordant regulation.

#### 6. Member States Have Two Options for Compliance: Reform or Liberalize

In 2013, the CJEU dealt with two major compatibility challenges in the gambling regulation field. In *Stanleybet et al. v. Ypourgos Oikonomias kai Oikonomikon*, the Fourth Chamber found the Greek monopoly system would likely be found incompatible with the Treaty of Lisbon, and the CJEU made the explicit policy recommendation to either overhaul the monopoly system or move to a more liberal licensing system.<sup>120</sup> Most importantly, the Third Chamber in *Biasci and Others* found that a national regulation that bars cross-border provision of gambling services is inherently incompatible with the Treaty of Lisbon.<sup>121</sup> In *Biasci and Others* and *Stanleybet*, the CJEU has been increasingly willing to make policy recommendations and accord less deference to the national legislatures in determining gambling regulations. The CJEU's more active position coincides with the Commission's reopening of infringement proceedings against a number of Member States.<sup>122</sup> In *Biasci and Others* and *Stanleybet*, the CJEU is working in tandem with the Commission to uphold the fundamental freedoms and the Treaty of Lisbon.

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120. *Stanleybet et. al. v. Ypourgos Oikonomias kai Oikonomikon (Stanleybet)*, Joined Cases 186 & 209/11, [2013] E.C.R. I \_\_\_\_ (delivered Jan. 24, 2013), ¶ 36, 46–47 (finding the Greek grant of a monopoly to OPAP impermissible under EU law, especially where the monopoly is not “genuinely meet[ing] the concern to reduce opportunities for gambling.”). OPAP is an operator listed on the Athens Stock Exchange with the State shareholding never falling below a 34% stake in the company. *Id.* ¶¶ 6–7, 12. The State also retained the right to appoint the majority of the members of the board of directors of OPAP even though it was a minority shareholder. *Id.* ¶ 12. The majority of the Greek national court believes that the OPAP monopoly scheme is incompatible with EU law because there is no stated objective that justifies the strict scheme and the expansion of gambling in Greece has been uncontrolled. *Id.* ¶ 17.

121. *Biasci and Others*, Joined Cases 660/11 & 8/12, [2013] E.C.R. I \_\_\_\_ (delivered Sept. 12, 2013) (not yet reported), ¶¶ 12–13 (considering again the Italian licensing scheme where applicants were agents of Austrian online gambling operator Goldbet and holding the legislation incompatible because it precluded all cross-border gambling activity).

122. See *supra* notes 69–72 and accompanying text (discussing the reopening of infringement proceedings against noncompliant Member States).

The Fourth Chamber in *Stanleybet* made a policy recommendation to the Greek legislature: either reform the current monopoly system to control gambling or change over to a liberalized licensing scheme that may better protect consumers.<sup>123</sup> A licensing system would allow the Member State to retain discretion but would open up the market to controlled competition. In *Biasci and Others*, the Third Chamber firmly stated that prohibiting all cross-border gambling services is incompatible with EU law, though it reestablished the current inapplicability of mutual recognition.<sup>124</sup> Moreover, the CJEU emphasized the need for transparency and that economic protectionism cannot justify a restriction on free trade.<sup>125</sup>

Most recently, in April 2014, the CJEU decided the case of *Pfleger and Others*, which largely followed the opinion released by AG Eleanor Sharpston.<sup>126</sup> Continuing with the active line of reasoning in *Stanleybet* and *Biasci and Others*, the CJEU found the regulations in *Pfleger and Others* inconsistent and disproportionate with the Austrian legislature's consumer protection objectives due to the apparent true purpose of increasing tax revenues and the aggressive advertising campaign the government is currently undertaking.<sup>127</sup> Notably, the CJEU

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123. *Stanleybet*, [2013] E.C.R. I \_\_\_\_ (delivered Jan. 24, 2013), ¶¶ 45–47 (advising that, although “free, undistorted competition” might have negative effects, a Member State has two policy choices: reform a monopoly to make it compatible or consider that liberalization of the market better ensures consumer protection in a system like an administrative permit scheme).

124. *Biasci and Others*, [2013] E.C.R. I \_\_\_\_ (delivered Sept. 12, 2013), ¶¶ 37, 40–43 (drawing a red line finding that a national legislation that precludes all cross-border gambling activities is incompatible with EU law and re-establishing that there is no obligation of mutual recognition of licenses issued by other Member States).

125. *Id.* ¶¶ 31–33, 38 (requiring that licensing procedures be transparent and “clear, precise and unequivocal” and reiterating the holding from *Costa & Cifone* that economic protectionism is not an overriding policy objective).

126. *Pfleger and Others*, Case 390/12, [2014] E.C.R. I \_\_\_\_ (delivered on Apr. 30, 2014); see also Opinion of Advocate General Sharpston, *Pfleger and Others*, Case C-390/12, [2013] E.C.R. I \_\_\_\_, ¶ 25 (delivered Nov. 14, 2013) (discussing case involving the Austrian gaming machine license regulations and their proportionality).

127. *Pfleger and Others*, [2014] E.C.R. I \_\_\_\_, ¶ 54, 56 (delivered on Apr. 30, 2014) (concluding that Article 56 TFEU precludes the Austrian regulations because the regulations, whose “real purpose” is increasing tax revenue, do not consistently and systematically pursue the cited consumer protection objectives); see Opinion of Advocate General Sharpston, *Pfleger and Others*, [2014] E.C.R. I \_\_\_\_, ¶¶ 53–54 (delivered on Apr. 30, 2014) (noting the CJEU holds increasing revenues cannot justify restricting the freedom to provide services and that the referring court found hypocrisy

confirmed for the first time that the Charter of Fundamental Rights of the European Union applies where the free provision of services is unjustifiably restricted.<sup>128</sup> In these three cases, the CJEU is increasingly working in harmony with the Commission, which reopened infringement proceedings, to help the Commission fulfill its role as guardian of the Treaties.

## II. *THE CJEU'S APPROACH TO ONLINE GAMBLING*

Part II summarizes the CJEU's competing approaches to the compatibility analysis of gambling regulations with the Treaty and European Union laws and examines whether the CJEU's analysis is true to the underlying principles of the EU internal market. Beginning with *Gambelli* in 2003, Part II.A discusses the CJEU's close examination of the consistency and the proportionality of the means of Member States' gambling regulations with the ends sought to be achieved, an analysis that vigorously polices Member States' restrictions on the freedom to provide services. In contrast, Part II.B compares the analysis in *Gambelli* and *Placanica* with the CJEU's reversion to a more deferential stance in the 2009 *Santa Casa* ruling, which is unfaithful to the fundamental freedoms of the Treaty of Lisbon and coincided with a lull in the Commission's infringement proceedings.

### A. *The Stricter Assessment Outlined by the CJEU in Gambelli and Placanica*

Beginning in 2003 with the CJEU's preliminary ruling in *Gambelli*, the CJEU undertook a probing analysis of the Member States' means and ends in restricting gambling within their nation's borders. Three cases—*Gambelli*, *Lindman*, and *Placanica*<sup>129</sup>—laid down a compatibility framework that ratcheted

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in the stated objectives and the “colossal expenditure” on “aggressive” advertising, which the CJEU has found inconsistent in the past (citing *Dickinger & Ömer*, [2011] E.C.R. I\_\_\_\_, ¶¶ 58, 68)).

128. *Pfleger and Others*, [2014] E.C.R. I\_\_\_\_, ¶ 59 (delivered on Apr. 30, 2014) (supporting the AGs finding that an unjustified restriction on the free provision of services is impermissible under the Charter of Fundamental Rights of the European Union).

129. *Gambelli*, [2003] E.C.R. I-13031; see *Lindman*, [2003] E.C.R. I-13543; *Placanica*, [2007] E.C.R. I-1891.

up the proportionality and consistency analyses and gave less deference to national legislatures in comparison to the previous stance iterated in *Schindler* and *Zenatti*.<sup>130</sup> In this way, these three cases signal the CJEU's greater adherence to the tenets of the internal market and the Treaties.<sup>131</sup>

In its 2003 decision *Gambelli*, the CJEU questioned and examined the actual motive behind a Member State's restrictive regulation. There, the defendants were betting agents representing a British gambling operator, Stanley International, and were found to be acting in violation of the strict licensing scheme under Italian regulation.<sup>132</sup> The CJEU found the Italian legislation, which criminalized unlicensed gambling operations, to be a restriction on the freedom of establishment and the freedom to provide services called for by the Treaties.<sup>133</sup> The Italian legislation made it "impossible in practice" for public companies in other Member States to be licensed in Italy, and it was thus a restriction on the freedom of establishment.<sup>134</sup>

The CJEU also challenged the proportionality and necessity of the criminal penalties imposed on the defendant's betting agents, especially considering the advertising campaigns run by

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130. See Hörnle, *supra* note 83, at 11 (arguing that *Gambelli* took a more "pro-active stance" in questioning and analyzing the proportionality of the Italian legislation); see also Alain-Laurent Verbeke, *Gambling Regulation in Europe: Moving Beyond Ambiguity and Hypocrisy*, in *IN THE SHADOW OF LUXEMBOURG* 254 (Alan Littler et al. eds., 2011) (stating that *Gambelli* and *Placanica* signal a swing in the pendulum towards a stricter analysis than *Schindler* et al.); *Schindler*, [1994] E.C.R. I-1078; *Zenatti*, [1999] E.C.R. I-07289.

131. See *SPORTS BETTING*, *supra* note 2, at 29 (recognizing *Placanica* to be "strong confirmation" that there was a "clear turn towards liberalisation of the gambling sector in Europe")

132. *Gambelli*, [2003] E.C.R. I-13031, ¶ 10 (describing the factual background of the case).

133. *Id.* ¶ 76 (holding that the Italian legislation that imposes criminal penalties on violators of the licensing scheme is a restriction on the freedom of establishment and the freedom to provide services under EU law). But see Doukas & Anderson, *supra* note 60, at 237 (finding that though the CJEU found the regulation a restriction, the national court found the betting scheme proportionate and justified (citing Corte Supreme di Cassazione (Sezioni Unite Penali), Judgment No. 111/04 of 26 April 2004 (*Gesualdi*), available at <http://www.cortedicassazione.it/Notizie/Giurisprudenza/Comunitaria/CorteGiustizia/Scheda.asp?ID=473>)).

134. *Gambelli*, [2003] E.C.R. I-13031, ¶ 48 (contending that the Italian legislation functionally made it "impossible" for companies quoted on markets in other Member States to obtain a license in Italy and therefore restricted the freedom of establishment).

the Italian government that encouraged consumption of Italy's own licensed gambling services.<sup>135</sup> The CJEU found that the government's policy of expansion and advertisement was inconsistent with consumer protection concerns, such as reduction of the opportunity to gamble.<sup>136</sup> The CJEU concluded that restrictions on gambling services must limit betting activities in "a consistent and systematic manner," and found the expansionist policy of the Italian government with respect to domestic gambling operations to undermine this consistency.<sup>137</sup>

The CJEU also questioned whether the exclusion of listed companies from license-tendering proceedings is discriminatory against these companies because there are other less-restrictive ways of preventing fraud.<sup>138</sup> Furthermore, the judgment stressed that prevention of decreasing tax revenue is not an overriding general interest that can justify the restriction of fundamental freedoms.<sup>139</sup> This more searching analysis than the one the CJEU employed in *Schindler*, *Läärä*, and *Zenatti* of the gambling regulation's proportionality echoed points that had been raised, but not discussed at length, in the earlier preliminary ruling on Italian gambling regulation in *Zenatti*.<sup>140</sup>

Decided just six days after *Gambelli* in 2003, the Fifth Chamber of the Court considered the compatibility of a Finnish gambling regulation in *Lindman*.<sup>141</sup> Ms. Lindman, a Finnish national residing in Finland, won money in a Swedish lottery while on holiday and disputed the taxes levied on her winnings by Finland on the grounds that winnings from Finnish lotteries

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135. *Id.* ¶ 72 (urging the national court to view the necessity analysis in the context of the harsh, disproportionate criminal penalties and the advertising scheme employed by the state).

136. *Id.* ¶¶ 68–69 (considering the expansionist policy to be inconsistent with consumer protection objectives).

137. *Id.* ¶ 67 (outlining that restrictions must serve the policy objectives in a "consistent and systematic manner").

138. *Id.* ¶ 74 (questioning the Italian legislature's course of action where there are other means of preventing criminal activities in the gambling sector).

139. *Id.* ¶¶ 61, 69 (noting that it is "settled case-law that the diminution or reduction of tax revenue" is not an overriding policy justification under EU law).

140. See *Zenatti*, [1999] E.C.R. I-07289; *supra* notes 93–94 (discussing the need for gambling regulation to bring about a "genuine diminution in gambling opportunities" and for financial benefits to only be "incidental" to the other policy objectives of the legislation).

141. *Lindman*, [2003] E.C.R. I-13543.

are exempt from tax.<sup>142</sup> Here, the Fifth Chamber found the tax regulation discriminatory as it gave preference to Finnish lottery winnings over taxable foreign lottery winnings.<sup>143</sup> The Fifth Chamber also found the Finnish legislation lacked support on the record for its stated social objectives and, thus, the Treaty prohibited the discriminatory law.<sup>144</sup>

In 2007, the CJEU, once again, examined the compatibility of Italian legislation.<sup>145</sup> In *Placanica*, Stanley International challenged Italy's limited licensing system as a restriction on the freedom to provide services.<sup>146</sup> The CJEU stated that while Member States can set policy objectives in regulating gambling, each restrictive measure of the regulation must be subjected to a proportionality test.<sup>147</sup> Again, the CJEU chastised the Italian legislature for pursuing an expansionist policy with respect to domestically licensed gambling where the aim was to increase tax revenue, and criticized the legislation for failing to cite any real justifications.<sup>148</sup> In addition, the CJEU found that there were less restrictive ways to prevent fraud than the licensing procedure that imposed criminal penalties, and concluded that the Treaty prohibited the legislation.<sup>149</sup> Here, the CJEU openly recommended that the Italian legislature either revoke and

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142. *Id.* ¶¶ 2, 7–11 (outlining the question presented and the factual background of the dispute).

143. *Id.* ¶ 21 (holding that the Finnish legislation clearly discriminates against other Member States' lotteries).

144. *Id.* ¶ 27 (finding the Finnish legislation incompatible with EU law as it is discriminatory).

145. *Placanica*, [2007] E.C.R. I-1891 (issued by the Grand Chamber of the Court of Justice).

146. *Id.* ¶¶ 43–44 (considering the Italian licensing scheme already considered in *Gambelli* to be a restriction on the freedom of establishment and the freedom to provide services); see Doukas & Anderson, *supra* note 60, at 247 (calling Stanley International's challenge unsurprising because the latitude Italy enjoyed in regulating against crime in gambling allowed the regulation to serve as a pretext that primarily served Italy's "economic interests and budgetary considerations").

147. *Placanica*, [2007] E.C.R. I-1891, ¶¶ 48–49 ("[A]lthough the Member States are free to set the objectives of policy . . . the restrictive measures that they impose must nevertheless satisfy the conditions laid down in the case-law of the CJEU as regards their proportionality.").

148. *Id.* ¶ 54 (criticizing the Italian legislature for failing to cite a policy objective such as reduction of gambling activity or limiting gambling opportunities).

149. *Id.* ¶¶ 62–64 (citing the AG's Opinion in point 125 for alternative and less-restrictive means of regulating gambling and preventing fraud).



redistribute the old licenses or open tenders on new licenses.<sup>150</sup> Furthermore, the CJEU found that Italy could not apply criminal penalties to the defendants where Italy had refused to grant Stanley International a license in breach of Community law.<sup>151</sup>

In these cases, the CJEU reconsidered the significant deference granted to national legislatures in earlier preliminary rulings on gambling activity. The CJEU's more searching analysis of the consistency and proportionality of gambling regulations to social objectives is truer to the underlying principles of the free market and the Treaty of Lisbon.<sup>152</sup> The thorough analysis of the national legislature's true objectives employed in *Gambelli* and *Placanica* is more in accordance with the Treaty restrictions.<sup>153</sup> Moreover, the CJEU stresses in *Gambelli* that economic protectionism is not a valid justification for restricting one of the fundamental freedoms.<sup>154</sup> The stricter proportionality and consistency framework applied in these rulings allow Member States to frame a national gambling policy while still honoring the principles of the internal market.

### B. A New Leniency and the Rejection of Mutual Recognition

Two years after the decision in *Placanica*, the CJEU fell back to its former position of deference to the national legislatures

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150. *Id.* ¶ 63 (finding an "appropriate course of action could be the revocation and redistribution of the old licences or the award by public tender of an adequate number of new licences").

151. *Id.* ¶¶ 68–71 (rejecting the application of a criminal penalty for failing to fulfill an administrative formality that was made impossible by the Member State itself).

152. See Doukas and Anderson, *supra* note 60, at 245–46 (describing the CJEU as "anxious to circumscribe" Member State discretion considering the severity of Italian laws and the fact that fundamental freedoms are being restricted due to concerns about "the human passion for gambling" and associated criminality); see also Verbeke, *supra* note 130, at 253–54 (finding the thorough analysis of consistency and proportionality to be a stricter analysis of the respect given by Member States to the supremacy of fundamental European principles).

153. See Hörnle, *supra* note 83, at 11–14 (citing the questioning of the "actual" objectives of the Italian legislature in *Gambelli* as particularly thorough and finding that *Placanica* gave the Italian court clear guidance and little room for maneuvering in its judgment); see also Verbeke, *supra* note 130, at 254 (stating that *Gambelli* and *Placanica* signal a swing in the pendulum towards a stricter analysis than *Schindler* et al.).

154. *Gambelli*, [2003] E.C.R. I-13031, ¶¶ 61, 69 (noting that it is "settled case-law" that neither tax protectionism nor economic protectionism may serve as justifications for restricting a fundamental freedom).

with respect to gambling regulation.<sup>155</sup> The CJEU no longer engaged in a proportionality analysis and generally yielded to the Member States' legislatures.<sup>156</sup> Moreover, the CJEU explicitly rejected the idea of applying mutual recognition in this field due to the unique risks posed by gambling, even though mutual recognition has been applied with success in other complex fields such as medical services.<sup>157</sup> The CJEU's deference to the Member States despite the fact that the regulations at issue potentially could be found disproportionate—the cases at hand involve monopoly grants and total bans on gambling advertisement—does not honor the principles of the Treaties and fundamental freedoms.<sup>158</sup>

The Grand Chamber of the Court issued another preliminary ruling in 2009 regarding the Portuguese monopoly grant in the preliminary ruling for *Santa Casa*.<sup>159</sup> The Portuguese legislature had for many years granted a monopoly to the non-profit Departamento de Jogos da Santa Casa da Misericórdia de Lisboa (“Santa Casa”) and had extended this monopoly to online gambling operations.<sup>160</sup> Bwin, an online gambling operator based in Gibraltar, entered into a sponsorship agreement with the First Football Division (the “Liga”) in

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155. See SPORTS BETTING, *supra* note 2, at 53–60 (describing the “shockwave [sent] across the continent and beyond” by the decision in *Santa Casa* that was a break from the law after *Placanica* and stating that *Santa Casa* “perplexed” matters post-*Gambelli* and *Placanica*).

156. See SPORTS BETTING, *supra* note 2, at 29, (citing the *Santa Casa* judgment on September 8, 2009 as “a day that delivered a significant blow to the private gambling sector”); see also Dawes & Struckmann, *supra* note 12, at 261 (concluding that *Santa Casa* was a “disappointment” of a judgment that did not engage in a detailed analysis of the facts and resulted in a ruling based on “a profound misunderstanding of factual reality”).

157. See *Santa Casa*, [2009] E.C.R. I-7633, ¶¶ 69–70 (rejecting the application of mutual recognition in the online gambling field); see also Dawes & Struckmann, *supra* note 12, at 260 (arguing there is “no apparent reason” why mutual recognition cannot apply to the field of online gambling).

158. See Doukas & Anderson, *supra* note 60, at 276 (arguing that the deference granted Member States allows for “*de jure* or *de facto* monopolistic or oligopolistic organization” of the gambling market and creates a “game reserve for the exploitation of Member States.”); see also Dawes & Struckmann, *supra* note 12, at 243 (arguing that the CJEU’s approach in *Santa Casa* was “misguided” in light of precedent and “economic reality.”).

159. *Santa Casa*, [2009] E.C.R. I-7633, ¶¶ 1–3 (describing the legal background of the case).

160. *Id.* ¶¶ 3–11 (outlining the gambling regulation framework in Portugal).

Portugal for the 2005–2006 season.<sup>161</sup> Shortly thereafter, Bwin and the Liga were fined for promoting, organizing, and operating Internet gambling in contravention of the Portuguese monopoly legislation.<sup>162</sup> The CJEU found the monopoly legislation to be a restriction on the freedom to provide services, but one that is justified in the pursuit of fraud prevention.<sup>163</sup> Here, the CJEU highlighted the unique risks posed by online gambling—namely, the lack of direct contact between consumers and operators—and rejected the possibility of mutual recognition.<sup>164</sup>

In 2010, the CJEU issued at least seven preliminary rulings on gambling regulations in the European Union, commencing with the rulings issued on the same day in June by the Second Chamber.<sup>165</sup> *Ladbrokes Ltd. v. Stichting de Nationale Sporttolisator* concerned the British company's operation of gambling via the Internet in the Netherlands in contravention of the exclusive monopoly granted to the non-profit De Lotto by Dutch law.<sup>166</sup> Similarly, *Sporting Exchange Ltd. (t/a Betfair) v. Minister van Justitie* concerned the British online gambling operator's unsuccessful attempt to procure a license in the Netherlands.<sup>167</sup> Both rulings found the monopoly grant to the non-profit De Lotto to be a restriction on the freedom to provide services.<sup>168</sup> Both rulings also stated, however, that national authorities must be given a margin of discretion, in the context of moral, religious, or

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161. *Id.* ¶¶ 20, 25 (summarizing the online gambling operator Bwin's actions at issue).

162. *Id.* ¶ 26 (discussing the fines imposed on Bwin and the First Football Division ("Liga")).

163. *Id.* ¶¶ 54, 62–67, 73 (finding the regulations to be a restriction on the freedom to provide services that is justified by the legislature's cited objective of crime prevention).

164. *Id.* ¶¶ 69–70 (finding that even though Bwin is licensed in another Member State, Portugal is entitled to find this insufficient assurance that Portuguese consumers would be protected against fraud and crime).

165. *See Betfair*, [2010] 3 C.M.L.R. 41.

166. *Ladbrokes*, [2010] 3 C.M.L.R. 40, ¶¶ 3–10 (describing the legal and factual context of the dispute involving Ladbrokes and De Lotto).

167. *Betfair*, [2010] 3 C.M.L.R. 41, ¶¶ 10–20 (summarizing the dispute between the Dutch De Lotto and the British Betfair gambling operator).

168. *Ladbrokes*, [2010] 3 C.M.L.R. 40, ¶ 16 (concluding that a monopoly regime constitutes a restriction on the freedom to provide services); *see Betfair*, [2010] 3 C.M.L.R. 41, ¶ 24 (emphasizing that monopoly legislation is commonly found to restrict free provision of services).

cultural factors, to restrict gambling on the grounds of public policy.<sup>169</sup>

Further, in *Ladbroke's* the CJEU again faced the question of whether it is consistent for national authorities to employ an expansionist policy in gambling operations while pursuing the objective of crime prevention and reduction of gambling within the Member State.<sup>170</sup> Here, the CJEU found that authorized operators must be able to present a “reliable” and “attractive” service in order to draw consumers away from illegal activity, and therefore, controlled expansion of gambling operations can be consistent with the Member State’s objectives.<sup>171</sup> However, the CJEU found it difficult to reconcile an expansionist policy with the objective of protecting consumers and left this question for the national court to determine.<sup>172</sup> Again, the Second Chamber stressed the unique risks posed by online gambling, and found the regulations proportionate to and justified by the overriding objectives of crime and fraud prevention.<sup>173</sup>

In July 2010, the Fourth Chamber also issued a preliminary ruling on gambling regulations in *Sjöberg & Gerdin*.<sup>174</sup> In *Sjöberg & Gerdin*, newspaper editors advertising in Sweden for online gambling operators were found to be acting in violation of Swedish law and were fined SEK 50,000 kr (approximately US\$6541).<sup>175</sup> The CJEU found the restriction on advertising

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169. *Ladbroke's*, [2010] 3 C.M.L.R. 40, ¶¶ 17–20 (allowing restrictions on the free provision of services in light of overriding reasons in the public interest); see *Betfair*, [2010] 3 C.M.L.R. 41, ¶¶ 26–29 (justifying restrictions on the grounds of public policy, public security, or public health).

170. *Ladbroke's*, [2010] 3 C.M.L.R. 40, ¶¶ 23–25 (citing the referring courts own doubts regarding the consistency of an expansionist gambling policy with the objectives on the record).

171. *Id.* ¶ 25 (holding that controlled expansion is justified when the expansion is aimed at channeling gambling activity to regulated rather than clandestine operators).

172. *Id.* ¶¶ 26–38 (leaving the issue of consistency to the national court to determine).

173. *Id.* ¶¶ 54–58 (noting the different liabilities posed by the online gambling market sector and finding that in light of these differences, the contested restriction is justified); see *Betfair*, [2010] 3 C.M.L.R. 41, ¶¶ 33–37, 60–62 (deferring to national courts and legislatures regarding online gambling regulations due to the unique risks posed by the activity).

174. *Sjöberg & Gerdin*, [2010] E.C.R. I-6921.

175. *Id.* ¶¶ 19–23 (describing the contested events in the main proceedings). According to the Swedish court, the Swedish legislation sought to “counter criminal activity; counter negative social and economic effects; safeguard consumer protection

necessary and justified because it was only ensuring that consumers gamble within the authorized Swedish system.<sup>176</sup> The CJEU admonished the Swedish legislature for inconsistently fining advertisers of unlicensed services more than the Swedish operators.<sup>177</sup> Here, the Fourth Chamber did not engage in an analysis of the regulation's proportionality or discriminatory character, but rather left the matter to the national court to determine.<sup>178</sup>

The CJEU here retreated from the vigorous analysis employed in *Gambelli*, citing the unique risks posed by online gambling.<sup>179</sup> These rulings marked a return to the lenient, hands-off approach taken in earlier rulings like *Schindler* and *Läärä*, and deferred much of the analysis to the national courts.<sup>180</sup> Moreover, the CJEU did not engage in a proportionality analysis in *Sjöberg & Gerdin*.<sup>181</sup> These rulings were less faithful to the goals of the fundamental freedoms and the internal market.

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interests, [and] apply the profits from lotteries to objectives which are in the public interest or socially beneficial." *Id.* ¶ 5.

176. *Id.* ¶¶ 33–34, 39, 45 (stating that the restriction on the freedom to provide services in the Kingdom of Sweden and advertising is justified as it furthers the legislature's objective of channeling gambling to regulated operators).

177. *Id.* ¶ 56 (chastising the Swedish legislature for potentially fining advertisers of Swedish gambling activities less than advertisers of gambling in other Member States).

178. *Id.* ¶¶ 55–57 (deeming the issue best left to the referring court to determine if the regulations at hand are evenhanded and proportionate).

179. *See Santa Casa*, [2009] E.C.R. I-7633, ¶¶ 69–70 (rejecting the application of mutual recognition in the face of the risks posed by online gambling to consumers); *see also Ladbrokes*, [2010] 3 C.M.L.R. 40, ¶¶ 54–58 (concluding that the different risks posed by online gambling justify the restriction); *Betfair*, [2010] 3 C.M.L.R. 41, ¶¶ 33–37, 60–62 (allowing restriction on the free provision of services in light of the risks of online gambling).

180. *See SPORTS BETTING*, *supra* note 2, at 29 (analyzing the *Betfair*, *Ladbrokes*, and *Sjöberg & Gerdin* decisions to confirm dicta in *Santa Casa*, a case that "delivered a significant blow to the private gaming sector," regarding monopolies and other restrictive policies in the Netherlands and Sweden); *see also Verbeke*, *supra* note 130, at 254 (calling the *Santa Casa* ruling a pendulum swing back to *Schindler* that has a low burden of proof, ignores conflicts of interest, and too readily accepts the Portuguese government's argument); *Doukas*, *supra* note 60, at 244 (characterizing the CJEU as "generally reluctant to engage in a rigorous review of the compatibility of national licensing systems with the Treaty" and deferential to national courts).

181. *Sjöberg & Gerdin*, [2010] E.C.R. I-6921, ¶¶ 55–57 (leaving the determination of nondiscrimination and proportionality to the national court entirely).

### III. NATIONAL REGULATION OF ONLINE GAMBLING SHOULD FOLD IN FAVOR OF EU-WIDE REGULATION

Online gambling is uniquely extraterritorial in that national borders are virtually nonexistent on the Internet. Thus, online gambling escapes regulation and enforcement more easily than conventional gambling.<sup>182</sup> The differing national regulations of the Member States have created legal uncertainty that many online gambling operators have exploited through operations in the grey market.<sup>183</sup> Moreover, the online gambling market in the European Union is rapidly growing at a rate of fifteen percent and is broadly unregulated with roughly eighty-five percent of online gambling websites unlicensed as of 2006.<sup>184</sup> Thus, crime prevention and consumer protection objectives, especially protection of minors, are not being accomplished in the regulation of online gambling.

First, the European Union must harmonize the differing national regulations to properly combat the social risks associated with online gambling. Online gambling is a borderless activity, which calls for borderless solutions. Second, the CJEU must continue to pursue infringement proceedings brought by the Commission and to rigorously examine the compatibility of national regulations on gambling with the Treaty principles. The thorough analysis employed in *Gambelli-Placanica* and revitalized by *Carmen Media* is a more appropriate compatibility analysis than the highly deferential test used in *Santa Casa*.<sup>185</sup> Moreover, the CJEU should continue on the recent line of reasoning carried out in *Stanleybet* and encourage Member States to either drastically reform the monopoly systems

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182. See *supra* notes 24–26 and accompanying text (discussing the legal uncertainty surrounding gambling regulation and the illegal market that has grown out of said uncertainty).

183. See *supra* note 25 and accompanying text (estimating that in 2006 eighty-five percent of active gambling websites operated without a license).

184. See *supra* notes 13–14, 22, 25 and accompanying text (estimating that the online market currently grows at a rate of fifteen percent, that eighty-five percent of operating websites were unlicensed in 2006, and outlining the lack of online gambling specific regulation but citing a number of electronic commerce regulations that affect the online gambling market).

185. See *supra* note 153 and accompanying text (affirming that *Gambelli-Placanica* symbolized a movement towards a stricter analysis); see also *supra* note 155 and accompanying text (describing the shockwave that *Santa Casa* sent across the jurisprudence).

or consider the consumer benefits of liberal licensing systems.<sup>186</sup> The conflicting and inharmonious national regulations on online gambling clearly are not achieving their stated objectives of consumer protection and crime prevention.<sup>187</sup> The European Union needs to tackle the problem from a different angle—a harmonized angle.

*A. Minimum Harmonization in Online Gambling is Needed*

Online gambling calls for legislative solutions. The European Union's legislative institutions should continue their current dialogue and fulfill the objectives laid out in recent communications and resolutions.<sup>188</sup> The reopening of infringement proceedings against Member States whose regulations unduly restrict free trade in the gambling market is a step in the right direction.<sup>189</sup> Regulation of online gambling should be harmonized at the Community level, or at a minimum common security standards should be crafted to protect against online gambling by vulnerable consumers and minors. Minimum harmonization that sets the floor for online gambling regulation across the Union could better achieve consumer protection by creating EU-wide age minimums and identity checks.<sup>190</sup> This is an especially attractive option because gambling regulation implicates so many social and moral policy issues.<sup>191</sup> Member States would be free to legislate above the minimum standards and could become useful as policy labs.<sup>192</sup>

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186. *See supra* note 123 and accompanying text (describing the implicit policy recommendation the CJEU made in *Stanleybet*).

187. *See supra* notes 24–26 and accompanying text (outlining the legal uncertainty in the market and the number of online gambling websites operating without a license).

188. *See supra* notes 63–73 and accompanying text (summarizing briefly recent Parliament and Commission steps taken in the field of online gambling regulation).

189. *See supra* notes 68–71 and accompanying text (regarding the 2013 decision for the Commission to reopen infringement proceedings).

190. *See supra* notes 50–51 and accompanying text (explaining the differing degrees of harmonization and the potential applicability of minimum harmonization to the field of gambling regulation).

191. *See supra* notes 15–22 and accompanying text (describing the social risks traditionally associated with gambling, specifically via the Internet).

192. *See supra* note 51 and accompanying text (giving an example of Member States acting as policy labs in the environmental field).

In the meantime, the CJEU should reconsider its explicit rejection of the application of mutual recognition in gambling regulation. The application of the principle of mutual recognition could lead the way to EU-wide regulation. Mutual recognition guarantees market access across the European Union despite differing national regulations.<sup>193</sup> Due to the political sensitivity of the issue and the large tax revenues at stake, application of the principle may be difficult to achieve—especially considering the fact that many Member States do not want to increase competition in and availability of gambling services.<sup>194</sup>

*B. The CJEU Must Remain Committed to the Fundamental Freedoms and Employ a Probing Analysis of National Restrictions on Gambling Services*

Until harmonization is politically feasible, the CJEU should consistently apply the compatibility analysis it currently employs to guarantee that the restrictions on the fundamental freedoms are justified.<sup>195</sup> The inconsistent approach the CJEU has taken in examining gambling regulations to date has perpetuated and perhaps invited the existing fragmentation and legal uncertainty in the online gambling market.<sup>196</sup> Recently, the CJEU has returned to a compatibility analysis that demands proportionality and fully examines the national legislature's proposed justifications.<sup>197</sup> The CJEU must continue to emphasize the importance of consistency and proportionality in regulation. It is important that the CJEU continue to examine the national legislatures' objectives, as it did in *Gambelli* and

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193. See *supra* notes 52–55 and accompanying text (discussing the principle of mutual recognition, the equivalence it creates in the law, and the debate over applying the principle to the field of gambling regulation).

194. See *supra* notes 56–57 and accompanying text (criticizing the application of mutual recognition in the gambling market).

195. See generally *supra* notes 105–08, 129–34, 152–54 (discussing the compatibility analysis employed in *Gambelli-Placanica* and revitalized in *Carmen Media*).

196. See generally *supra* notes 24–26 and accompanying text (referring to the legal uncertainty in the online gambling market).

197. See *supra* notes 98–128 and accompanying text (detailing the trend beginning in 2010 in the CJEU of employing searching and thorough analyses in reviewing the compatibility of gambling regulations with the Treaty).



*Placanica*, as economic protectionism can never serve as a justification for restricting free trade.<sup>198</sup>

The CJEU should also continue to require support on the legislative record that criminal activity or deterrence of consumer addiction is significant enough to warrant strict regulation as it did in *Dickinger & Ömer* and *Zeturf*.<sup>199</sup> Even if there are findings that support the stated objectives, the CJEU must insist that the regulations are proportionate to, and consistent with, these findings. The cloak of protective objectives is often used as a pretense to support the economic benefits of monopoly or licensing regulatory schemes actually pursued, as seen in *Dickinger & Ömer*, *Gambelli*, *Placanica*, and, most recently, *Pfleger*.<sup>200</sup> As always, the CJEU must not allow discrimination on the basis of national origin or place of establishment, as it reaffirmed in *Costa & Cifone* and *Engelmann*.<sup>201</sup>

Moreover, in *Stanleybet* the CJEU recently advocated for the more liberal licensing permit scheme over the monopoly model of regulation.<sup>202</sup> This policy stance is a remarkable change from *Carmen Media*, which was itself a landmark case that supported liberalization of the market, where the CJEU stated that a monopoly could be found suitable and necessary.<sup>203</sup> The language in *Stanleybet* is stronger, and the CJEU makes a policy recommendation to the Greek legislature either to reform the current monopoly system or to recognize that a liberalized licensing system may better protect consumers against addiction and fraud.<sup>204</sup> If all the Member States employed a licensing

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198. See *supra* notes 132–54 and accompanying text (summarizing the series of cases, beginning with *Gambelli*, that more closely examined the national legislature's objectives than in *Schindler* or *Santa Casa*).

199. See *supra* note 115 and accompanying text (calling for legislative support for restrictive measures imposed on gambling in the cases *Dickinger & Ömer* and *Zeturf*).

200. See *supra* notes 115–16, 127, 136–37, 148 and accompanying text (citing cases where the CJEU found or should find inconsistency in the stated ends and the employed means: *Dickinger & Ömer*, *Pfleger*, *Gambelli*, and *Placanica*).

201. See *supra* notes 109, 112–13 and accompanying text (re-establishing vigorously that regulations may not discriminate on the basis of nationality).

202. See *supra* note 123 and accompanying text (briefly summarizing the CJEU's implicit policy recommendation in *Stanleybet*).

203. See *supra* notes 105–06 and accompanying text (finding that a monopoly in Germany potentially could be found suitable and consistent).

204. See *supra* notes 123–25 and accompanying text (recommending that the Greek government either overhaul the monopoly system or liberalize).

permit scheme, then mutual recognition could more effectively apply. Furthermore, the CJEU could find online gambling is sufficiently distinguishable from conventional gaming to warrant a separate judicial analysis that acknowledges the inherent cross-border nature of the activity.

If the European Union continues to leave the analysis of online gambling regulations that restrict free trade to the CJEU, then the CJEU must carefully police these regulations to prevent economic balkanization and maintain market access. To this end, the CJEU should continue to engage in a thorough analysis of proportionality and consistency when examining the means and the ends of Member States' online gambling regulation.

### CONCLUSION

The current unregulated state of online gambling in the European Union and the web of conflicting regulations in the Member States actively contributes to the confusion, potentially allowing operations by unscrupulous operators. Moreover, these unregulated websites create undesirable risk to minors and individuals with gambling addictions. Ultimately, a system of EU-wide regulation is the most appropriate solution to issues in a market that spans the European Union. Until such a system can be achieved, the CJEU should continue to insist on a thorough analysis of Member States' regulations by evaluating the proportionality and non-discriminatory nature of such regulations. Member States should also heed the CJEU's decision in *Stanleybet*: either overhaul monopoly systems or liberalize the market by instating a licensing system.

